SUBMISSION TO

THE FIVE YEAR REVIEW OF THE PROGRESS OF THE IMPLEMENTATION OF THE VICTORIAN REGIONAL FOREST AGREEMENTS-

28 FEBRUARY 2010

Photographs of logging at Brown Mountain tendered in evidence and likened by Forrest J to " pictures of the battlefields of the Somme".

Photos courtesy of Environment East Gippsland Inc

MARIA I E RIEDL

The Five-Yearly review of Victoria's RFAs (Regional Forest Agreements) has to provide the assessment of the assessment of progress 'made against the RFAs and these include

- the extent to which milestones and obligations have been met, including the management of the National Estate
- the results of monitoring of sustainability indicators
- invited public comment on the performance of the Agreement

I have grave concerns about this particular action and have copied and pasted as much information as I can give you so you can see that there are real issues about Victoria and its ability to ensure that obligations are met, and that political agendas are unacceptable, and promises made by politicians are adhered to, especially if they impact upon species and communities that are to be protected by State and Commonwealth and International laws and agreements.

I have included as much information as I can and with a limit in time I have to leave it with you. It is obvious that there are major issues and that these have not been addressed. The idea that RFAs ensure that Forestry and States can be left to police themselves is being questioned in the courts right at this moment.

The disaster happening on Brown Mountain is just one example of impacts that are being allowed and encouraged by the Minister for the Environment and even Mr Brumby who has been recorded as stating unequivocally that old growth forests are not to be logged because of their values.

They have broken this promise for the sake of greed and political gain. They have failed to ensure protection of those matters that are required to be protected in law. Totally unacceptable and I state that they have failed in their 5 yearly review.

The conclusion that must be made is the VicForest believes that they are above the law and can bend it at will for financial gain and the Victorian Government and DSE is complicit in allowing them to do this. This is totally unacceptable and must surely send alarm bells ringing and a serious question as to whether they can be trusted to police themselves. It also begs the question on what has been lost without our knowledge and without any rigorous investigations by them, thinking that no one will notice. It is not allowable to log without impunity, they must surely have a responsibility to ensure that areas that are promised to be set aside because of their intrinsic value; in this instance old growth trees on Brown Mountain; then this must be done. Having ONLY regard for economic profits without proper regards for species and communities that are reliant upon these old growth forests is totally unacceptable and must be sanctioned and immediately stopped.

I am certain that the EPBC Act can also remove the protection of RFAs because of this proof of acting without care and without adhering to the protocol of RFAs. Under the EPBC Act forestry operations must surely have to comply with a standard that is equivalent to the protection these forests would be offered as if they were protected under the Act itself. By RFAs being excluded one assumes that the same rigorous protections must apply to species that are protected under the Act (see Division 4 Forestry operations in certain regions Subdivision A Section 38to 42). There is also this requirement of a 5 yearly review which must show that Forestry is actively protecting species and communities that are listed. If they are not I assume the RFAs could and should be cancelled and that they must come back under the umbrella of the EPBC Act because they have failed the review.

They have also omitted to include the Mallee in any review! Why as it is part of Victoria and we do have state forests up here as well.

Apologies for copying so much but you need to see all this first hand so that you can ensure that your judgement is informed. Have a look at the web sites.

http://www.eastgippsland.net.au/?q=campaigns/brown_mountain/media

Brown Mountain - Media Releases

FATE OF NATIVE FOREST HANGS ON ‘DAVID VS GOLIATH’ COURT CASE

MEDIA ALERT

Environment East Gippsland Inc (EEG) v Vic Forests

Brown Mountain Court Case, Sale, Monday, March 1

The fate of a native forest with trees dating back to Joan of Arc‘s time is at stake in a Supreme Court case to be heard at the Victorian centre of Sale from Monday (March 1).

The landmark Brown Mountain case has national implications for all native forests in Australia and major political implications, with the green vote likely to be vital for both State and Federal Labor Governments in an election year – which is also the UN‘s Year of Biodiversity.

In a David and Goliath battle, Environment East Gippsland (EEG) is seeking to stop state-owned logging monopoly VicForests from clear-felling Brown Mountain, a rich and ancient forest which is —chockablock with threatened and endangered species.

The action marks the first time a Victorian court has been asked to grant a permanent injunction against state-sanctioned logging.

It will also raise the fundamental conflict in Australia‘s Regional Forest Agreement – where the State Government charged with protecting the forests is also the logger.

That was underlined in Victoria last year when Environment Minister Gavin Jennings gave the go-ahead to logging at Brown Mountain, declaring there were no threatened species in there. That very morning an EEG camera captured footage at Brown Mountain of a Long-footed Potoroo, one of Victoria‘s most endangered species.

In the absence of government protection, EEG was forced to take legal action to defend the forest – an enormous and costly step for a community group.

In an Australian first, EEG last year won a temporary injunction on logging at Brown Mountain, ahead of the full hearing, with Supreme Court Justice Forrest comparing images from the forest to the WW1 battlefields of the Somme.

But even if successful with their action, conservationists anticipate the Victorian Government may favour the logging industry and over-ride the court‘s decision as has happened in previous high-profile cases in both Victoria and Tasmania (see backgrounder).

Media please note: Interviews are available with EEG representatives and Australian Greens Leader Bob Brown. Contact Marie McInerney on 0418 273 698 to organise or for more information.

BROWN MOUNTAIN BACKGROUND

Brown Mountain, in East Gippsland in Victoria, contains old growth forest with ancient trees, one carbon-dated to 600 years old. It is prime habitat for threatened species including the Long-footed Potoroo, Spot-tailed Quoll, Sooty Owl, the Large Brown Tree Frog, the Square-tailed Kite, and the Giant Burrowing Frog. It is also a hotspot for arboreal mammals, like the Greater Glider and the Yellow-bellied glider.

Environment East Gippsland (EEG) alleges that logging four coupes on Brown Mountain is unlawful because it breaches provisions to protect endangered and threatened species in the Victorian Sustainable Forests (Timber) Act 2004 and the Flora and Fauna Guarantee Act 1988. In particular EEG says that VicForests has failed to comply with the Code of Practice for Timber Production 2007.

In the 2006 election, the Bracks Labor Government promised to protect "the last significant stands of old growth currently available for logging". Brown Mountain should clearly have been included but, instead, 20 hectares were logged in summer 2008-09. Threatened species surveys triggered a moratorium in February 2009 followed by more surveys over winter and spring and, in August 2009, an

EEG survey camera recorded the presence of a Long-footed Potoroo, one of Victoria‘s most endangered species, despite the government‘s declaration – earlier that same day- that there were NO threatened species at Brown Mountain.

In September 2009, EEG successfully obtained an interim injunction against VicForests to prevent logging in the coupes. In granting the injunction, Justice Forrest likened photographs of logging to ‗pictures of the battlefields of the Somme‘.

Already the case has delivered important precedents:

- The Supreme Court refused VicForests' application for up to $163,000 in security from EEG before a court injunction was granted to stop logging on Brown Mountain. Having to pay such a large sum would have stopped the community group being able to challenge critical habitat logging.
- The interim injunction, granted late last year, was also a groundbreaking decision because no Victorian court has ever ordered an injunction on logging before.

However there are concerns that the Victorian Government could override a logging ban, if the EEG case is successful.

Greens Leader Bob Brown successfully brought a court case to halt logging at the Wielangta forest in Tasmania because it threatened the endangered Swift Parrot, Tasmanian Wedge-tailed Eagle and Wielangta Stag Beetle. Then Prime Minister John Howard and Tasmanian Premier Paul Lennon amended the Regional Forest Agreement to permit logging to continue.

In 1998, logging at Goolengook in far eastern Victoria, the site of Australia's longest running forest blockade from 1997 to 2002, was found to be unlawful because it was within a protected area next to a Heritage River. The Victorian government changed the law retrospectively to make the logging legal

http://www.greenlivingpedia.org/Brown_Mountain_old_growth_forest#A_brief_history_of_Brown_Mountain

---

Brown Mountain old growth forest

The wonderful **old growth forest of Brown Mountain** in East Gippsland is now being logged. There are more than 50 trees over 300 years old in this area of forest, which is adjacent to Errinundra National Park. One logged tree has been radiocarbon dated to over 500 years old. Many more trees between 500 and 800 years old have now been logged.

The Labor Party pledged during the 2006 State election that:

In addition to the Goolengook Block, a Labor Government will immediately protect remaining significant stands of old growth forest currently available for timber harvesting by including them in the National Parks and reserves system. [1]

This Brumby Government has broken this promise. The bulldozers moved in late October 2008 and clear felling of the forest commenced.

It is worth noting that none of the forest areas specified for protection have actually been protected yet either, 2 years after the election. It seems that the Brumby government supports clearfelling old growth forest as "business as usual" despite the forests critical role in storing carbon (over 1000 tonnes per hectare) and providing water for the depleted Snowy River catchment. [2]

These forests also provide habitat for threatened species such as the **Powerful Owl**, the **Spot Tailed Quoll**, mainland Australia's largest marsupial carnivore, and the **Long-footed Potoroo**, Victoria's rarest marsupial. The endangered **Orbost Spiny Cray** has been found in Brown Mountain Creek.

The government has claimed it is delivering a 5,000 ha link between the Snowy and Errinundra National Parks, but including this area of Brown Mountain is a vital part of this link.

A brief history of Brown Mountain

East Gippsland's forests have been heavily clearfell logged now for 35 years. Logging of heritage listed National Estate forests commenced in 1989. Brown Mountain was targeted for logging . Protests in the forests eventually halted the logging there, but the remaining old growth forest was not all protected.

Brown Mountain was assessed and listed as an old growth National Estate area by the Commonwealth Heritage Commission in the 1980s, which means it has the same values as a National Park. The management of these areas were handed to the state government which promptly set about clearfelling them in 1989.

The protests on Brown Mountain against logging there attracted much media attention when 300 people were arrested and charged with entering the area being logged. A moratorium was put on the logging while the state govermenet carried out a "Prudent and Feasible Study" into alternatives to logging National Estate listed forests.

As compensation for the year-long moratorium, the Federal Government gave the State Government (Premier of the time - John Cain, Kay Setches was minister) $10 million. This was used to push new roads into the heart of the very areas being studied - in anticipation of the outcome. It was also used to carry out plantation trials in regrowth forests - part of the long-term agenda to convert publicly owned native forests into industrial tree farms.

Labor government response to concerns about the logging

When queried about this decision to destroy the old growth forest, the response from Premier Brumby's office was "since VicForests have moved the contractors in, there nothing we can do".

Premier Brumby's office was called on this matter on 30 October 2008 and advised that nobody could assist over the telephone, and that the best way to raise concerns about the logging were to email the Premier at john.brumby@parliament.vic.gov.au

Old growth forest maps of Brown Mountain

DSE map illustrating unprotected Brown Mountain old growth, circled

Victoria's Department of Sustainability and Environment's (DSE) own maps show that the area of Brown Mountain forest in question is old growth forest, which proves that it should have been included in the forest areas announced for protection in 2006, and therefore should not be logged.

The Old Growth Forest Walk - Goongerah

Labor's 2006 National Parks and Biodiversity policy included a commitment to create the **Old Growth Forest Walk - Goongerah** in the area of Brown Mountain old growth forest now being logged. The location of this walk has been agreed with DSE verbally, and during two site visits at Brown Mountain that included several representatives from DSE and the community.

The promise to construct this walk at Brown Mountain has been broken by the Brumby Labor Government. If the entire area is logged as planned, there will be no old growth forest left to walk through.

One of the logging coupes has even been named "The Walk" by DSE, which is a cruel irony.

Details of logging

Brown Mountain old growth coupes – 840-502-0020 is currently being logged

This area contains 3 highly contentious coupes (840-502-0015, 840-502-0019, 840-502-0020). Coupe 840-502-0020 is currently being logged. It is now within a designated "Public Safety Zone" and access by the public is therefore prohibited by the Victorian state government. The VicForests Couple plan for 840-502-0020 is called "The Walk".

A total of 60 hectares (20 hectares per coop) has been allocated for logging.

As at December 2, 2008 about 10 hectares has been logged from the first area.

The logging activities are providing employment for 4 people for about 6 weeks.

Over 80 percent of what is logged in East Gippsland ends up as woodchips,

according to VicForests, as a claimed byproduct from timber harvesting.

During the 2006-2007 over a 12 month period a total of 6,250 hectares of native forests was logged across Victoria.

Link to climate change

Brown mountain forest are among the most carbon dense forests in the world, storing in excess of 1200 tonnes of carbon per hectare in the trees, biomass, soil and leaf litter. This remains at a constant level in old growth forests.

Between 500 to 1000 tonnes per hectare of carbon is released when this forest is logged, including leaves, branches and tree tops which are burnt, and log residues which then rot. Some carbon is stored long term in the timber and wood products that are produced from these forests including flooring, furniture and house framing. However, less than 2% of the timber that is logged ends up as furniture.

Logging these specific Brown Mountain forests is therefore likely to result in excess of 10,000 tonnes of carbon emissions, none of which are accounted or paid for. The carbon emissions from logging this area alone are equivalent to an additional 2,500 cars on Victorian roads.

Minister's response to question in parliament confirms logging of old growth

On November 12, 2008, Sue Pennecuik (Greens MP) asked the following question of Environment Mininster Gavin Jennings in the Victorian Parliament:

> "Will the minister confirm that three logging coupes at Brown Mountain in East Gippsland — numbers 840-502-15, 19 and 20 that are mapped by the Department of Sustainability and Environment as old-growth forest — have been approved for clear-felling this season, that one is almost fully logged, and that this is in contravention to the Labour Party's 2006 commitment to protect the last significant stands of Victoria's old-growth forests currently available for logging?"

Some of the the response from Gavin Jennings:

> ..."Is there activity currently being undertaken in East Gippsland that is a source of contention in relation to the appropriateness of it being allocated for harvesting activity and being subject to protest activity?", I can confirm that that is absolutely happening."
>
> "Subsequently the election commitment — which was that we would increase the reserve system within East Gippsland — at one level may have been interpreted to mean that there would be absolutely no logging in areas that may be seen to be old growth, but they are not mutually exclusive commitments. In fact the coupes in question continue to be in areas known as general management zones within the forest." [3]

Supplementary question

Ms PENNICUIK (Southern Metropolitan) — The minister and I might disagree on what is on the maps. One of these logging coupes has been named „The Walk" by VicForests in reference to the local community"s marked and tracked tourist walk, which was also committed to by the Labor government as the „Old Growth Forest Walk — Goongerah". How is this consistent with the current logging operation?

Some of the the response from Gavin Jennings:

> Again, this may be an area of contention.— It is an area of contention where people purport that there had been an alignment of a walk that had been adopted by the various state agencies. Despite the fact that there are many passionate and committed people — and good on them for being passionate and committed to environmental outcomes and sustainability in this area and generally — there has been no formal adoption of any delineation of a walking track by government agencies or the government that will define how the commitment to those walks will be delivered on the ground.

Greens MP Sue Pennicuik has described the logging on Brown Mountain as "state sanctioned vandalism" [4]

VicForest's response

VicForests has attempted to defend the clear-fell logging of old-growth forest near Brown Mountain in East Gippsland. The East Gippsland manager of VicForests, Barry Vaughan, says *"the area was not part of the State Government's election promise to protect more forests"*.

In doing so, VicForests is ignoring the commitment made in Labor policy to protect the last remaining stands of old growth forests in Victoria available for logging. [5]

Department of Sustainability and Environment's response

Many people who contacted Premier Brumby of Minister Jennings to asked them to protect Brown Mountain from logging received this response in December 2008 from Janine Haddow, Executive Director for Natural Resources,

DSE: **LOGGING IN BROWN MOUNTAIN**

Unfortunately, Ms Haddow did not adequately address the concerns raised.

She did not address Labor's broken policy commitment to "immediately protect remaining significant stands of old growth forest currently available for timber harvesting by including them in the National Parks and reserves system."

She chose to ignore that fact that Brown Mountain forest should have been included in the forest areas specified for protection because it is designated as old growth forest by the Department of Sustainability and Environment and it forms an important part of the link between the Errinundra and Snowy River National Parks, the creation of which was also a policy commitment.

Ms Haddow‘s assertion that "logging occurs on a very small proportion of Victoria‘s public land estate" is simply not relevant. No old growth forest should be now logged, as Labor's policy states.

Ms Haddow‘s other assertion that "over time the net result from logging Victoria‘s native forest is an absolute reduction in greenhouse gas concentrations" is not correct. A scientific study by Mackey, Keith, Berry and Lindenmeyer (2008) found that:

> “the carbon stock of forests subject to commercial logging, and of monoculture plantations in particular, will always be significantly less on average (40 to 60 percent depending on intensity of land use and forest type) than the carbon stock of natural, undisturbed forests.”

Breaches of the Code of Forest Practices

DSE sign restricting access

Several serious breaches of the Code of Practice for Timber Production 2007 have occurred during the recent logging at Brown Mountain. The following breaches have been reported with photographic evidence:

1. Bulldozing of mixed rainforest along Brown Mountain Creek in readiness to start clearfelling the adjoining stand of ancient forest.
2. A logging contractor is being investigated for theft of burls.
3. A huge old tree has been felled outside the coupe boundary – this is illegal logging.
4. Used oil filters from bulldozers have been discarded on the ground which will contaminate soil and eventually water courses.
5. The endangered Orbost Spiny Cray has been found in Brown Mountain Creek

Buffer tree logged illegaly

Rainforest creek bulldozed

Endangered Orbost Spiny Cray

Logging has continued against occupational health and safety regulations when members of the public are present. Worksafe is apparently investigating this.

VicForests has prohibited access to the nearby Errinundra National Park via the tourist road for the past 3 months of summer holidays - with no alternative route offered. This is unacceptable. The public must have access to our National Parks.

The government halts logging

Anti-logging campaigners won a two-week reprieve after claiming to have discovered four threatened species in old-growth forest earmarked for harvesting. Scientists working on behalf of Environment East Gippsland say a survey last weekend found endangered glider, owl and crayfish species in a coupe at Brown Mountain. [6]

DSE is now conducting an ecology survey of the forest, which should have been performed prior to commencement of logging. If they confirm the presence of threatened species, as is likely, these forests will have to be permanently protected.

[edit] Protest on the steps of the Victorian parliament, November 7, 2008

[edit] Protest on the steps of the Victorian parliament, December 2, 2008

Greens MP Colleen Hartland attended.

Logged Brown Mountain tree dated at over 500 years old

Environment East Gippsland (EEG) has radiocarbon-tested a felled old-growth Brown Mountain eucalypt and the result suggests the giant gum was between 500 to 600 years old. A sample of a felled tree has been radiocarbon dated by the University of Waikato in New Zealand. [7]

Jill Redwood, EEG coordinator, stated:

> "Considering that ancient trees like these have been chainsawed down every day across south-east Australia, no-one has ever been able to give a definitive age on the trees"
>
> "They have got the bulk of a blue whale. They are just the land giants of the planet."
>
> "If this was a human artefact, it would be an incredibly precious antique, but because it is a tree they just think it can be cut down and sell it off for a song and most of it goes to wood chips."
>
> "We are hoping like hell that they are going to start realising that they can't replace these trees in the cycle of a logging cut. At the moment they are saying they are protecting a certain per cent so that is OK and they can log the rest."
>
> The tree that was radiocarbon dated was 10 metres in girth. Some trees logged have a 12 metre girth - by extrapolation they would be 800 years old.

[edit] First logging coupe destruction completed on 22 April 2009

The first 20 hectare "coupe" of this season's logging allocation in Brown Mountain was completed on 22 April 2009. The pictures below illustrate the destruction, which including the felling of more trees 600 to 800 years old.

There are two more 20 hectare coupes remaining. The officer of Environment Minister Gavin Jennings apparently now has the DSE report about threatened species and is considering what to do. It is not clear whether this document will be released to the public, or whether the remaining areas of Brown Mountain forest will be protected.


The stump of another 600 year old tree


Brown Mountain logging "arson - Government style"


Fern glade "management"


Brown Mountain logging "cleansing"


Brown Mountain logging "public safety zone"


Brown Mountain logging "sterilising the soil"

Environment Minister Jennings announces logging will proceed

On Friday 21 August 2009 Environment Minister Gavin Jennings released a DSE survey of Brown Mountain forest in East Gippland which states that high density populations of Greater Gliders and Yellow-bellied Gliders were found. This means they require immediate protection.

No Long-footed Potoroos were detected, but some diggings were seen in the study area, and the forest type was assessed as good quality habitat for Long-footed Potoroos.

The full DSE survey report is available here: Surveys for arboreal mammals (PDF - 133 KB).

Jennings also announced that "an additional 400 hectares of Brown Mountain would be protected". [8] This is political greenwash as that forest is already protected by Special Protection Zone.

Unfortunately, the forest areas surveyed along Brown Mountain Creek, and their trees over 600 years old, will now be logged, even though they are designated by DSE as old growth.

Environment East Gippsland has now taked out a court injunction to prevent the Government from allowing logging to proceed. [9]

[edit] Potoroo photographed in Brown Mountain forest

Potoroo in Brown Mountain forest

A rare long-footed potoroo has made an 11th-hour appearance for surveillance cameras at Brown Mountain that could win the area a reprieve from logging. Environment East Gippsland co-ordinator Jill Redwood released a photo of an endangered long-footed potoroo seen foraging in front of one of the cameras near Brown Mountain Creek, between two of the logging coups.

Environment East Gippsland has been monitoring nine surveillance cameras in the disputed area for four months trying to capture proof and at 3am on Friday 21 August 2009 they were successful. [10]

Logging halted again by court injunction

The Labor government Cabinet decision to proceed with the logging of Brown Mountain forest was challenged in the courts by Environment East Gippsland. The court provided an interim injunction to stop the logging (again) on 14 September 2009. [11]

Justice Jack Forrest found it was arguable that Potoroos were present in the logging zones.

The environmentalists' case was strengthened by photographs showing logging and subsequent burning in a nearby area leading to the "apparent total obliteration" of the area being harvested.

"To put it bluntly, once the logging is carried out and the native habitat destroyed, then it cannot be reinstated or repaired in anything but the very, very long term," Justice Forrest said.

He ordered a temporary injunction on logging until a full trial, to be held as soon as possible to limit VicForests' financial loss.

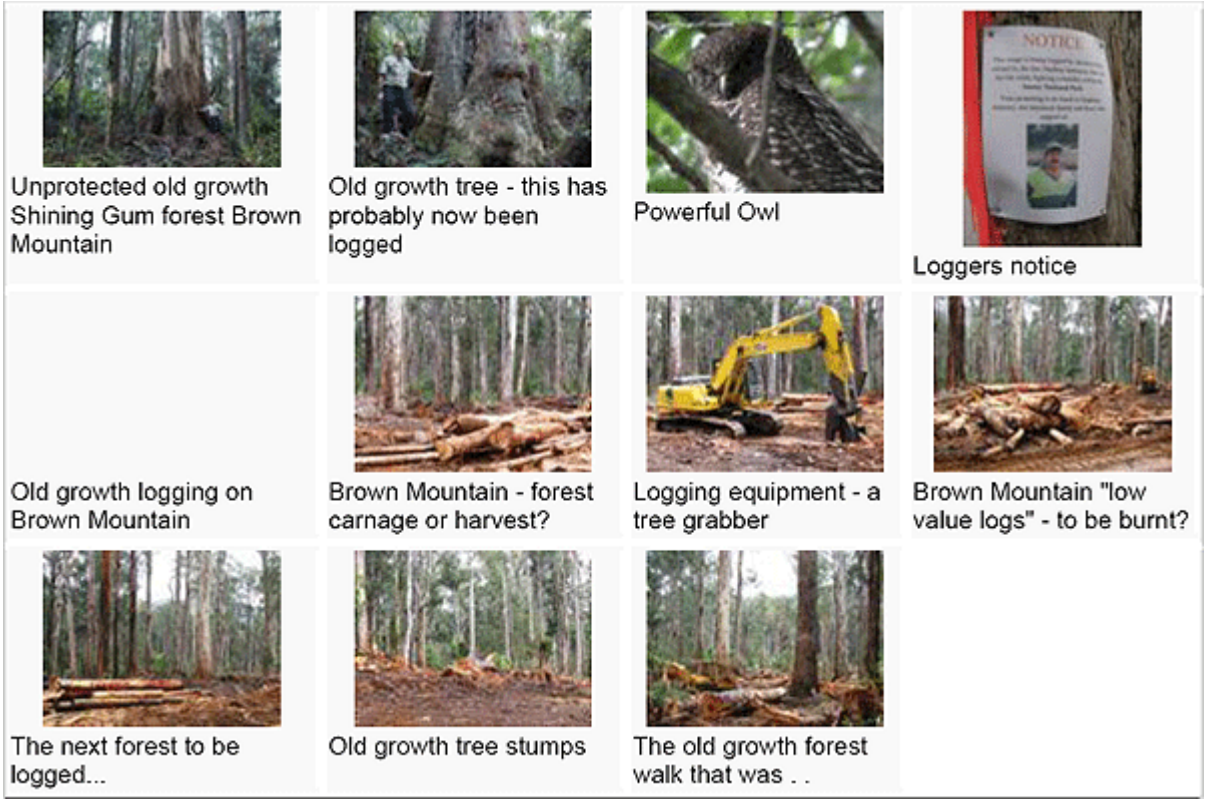
The trial is expected to be held in Gippsland late this year or early in 2010.

Supreme Court judge Justice Forest compared images of a felled forest with a World War I battlefield and stated that the case had been strengthened by photographs showing the "apparent total obliteration" of a nearby site during logging and subsequent burning off.

"To put it bluntly, once the logging is carried out and the native habitat destroyed, then it cannot be reinstated or repaired in anything but the very, very long term," he said.

Justice Forest told the court: "I know what it was like before and I know what it was like after, and I've also seen pictures of the battlefields of the Somme."[12][13]

Gallery



See also

- Recent news, media releases and information on Brown Mountain
- Forest friendly timber
- Stop logging Melbourne water catchments Green carbon
- John Brumby

[edit] More information, photos and external links

- The GECO website, with recent photos of Brown Mountain logging
- East Gippsland forest protection report, Peter Campbell
- Summary of East Gippsland forest protection report, Peter Campbell
- What to see and do in East Gippsland
- Errinundra National Park page, Parks Victoria

- Media release on Brown Mountain logging from environment groups
- Media release for Suits for Forests action , December 2, 2008
- Logging Brown Mountain video, EngageMedia
- Forests to pay for broken promises, Rosemary West, The Age, January 24, 2009
- The protection plan, Victorian Greens
- Brown Mountain media, www.forestwatch.info
- Declared forests turn out to be paddocks, The Age, 25/5/09

[edit] References

1. Labor protects last significant old growth stands, 17 November 2006 (PDF)
2. Nothing natural about selection of which trees die, Adam Morton, The Age, November 10, 2008
3. HANSARD: Timber industry: East Gippsland logging, Forest Letter Watch Blog
4. Logging on Brown Mountain is state sanctioned vandalism, Media Release, Australian Greens Victoria, November 7, 2008
5. VicForests defends Brown Mountain logging, ABC News, November 13, 2005
6. Logging on hold over species, The Age, January 29, 2009
7. Felled old-growth tree '500 years old', Samantha Donovan, abc.net.au, 2 April 2009
8. Permanent protection for Brown Mountain area, Gavin Jennings, Friday 21 August 2009
9. Battle lines drawn as logging moratorium ends, Adam Morton, The Age, August 22, 2009
10. Long-footed potoroo puts pressure on Brown Mountain logging, Megan McNaught, Heraldsun, August 24, 2009
11. Landmark injunction halts old-growth logging, The Age, 14 September 2009
12. Judge likens Gippsland logging to the Somme, Adam Morton, The Age, September 15, 2009
13. Environment East Gippsland Inc v VicForests (2009) VSC 386 (14 September 2009), Supreme Court of Victoria

http://www.greenlivingpedia.org/Brown_Mountain_old_growth_forest#A_brief_history_of_Brown_Mountain

Green carbon

Mountain Ash forest in Australia

Australia's native forests store three times as much carbon as previously thought and could hold the key to tackling climate change, according to a researchers.

A report released in August 2008 has found the eucalypt forests of south-east Australia - stretching from Queensland through NSW and Victoria and into Tasmania - store the equivalent of 25.5 billion tonnes of greenhouse gases.

The report also makes the point that leaving forests already logged to regenerate and regain a maximum carbon content is preferable to logging them again like plantations - which results in more carbon emissions.

Some interesting and compelling information in the paper:

> Eucalypt forests of south-east Australia - stretching from Queensland through NSW and Victoria and into Tasmania - store the equivalent of 25.5 billion tonnes of greenhouse gases.
>
> If all those forests were cleared and all of the carbon in the biomass in the soil were to be released into the atmosphere - that would be the equivalent of about 80 per cent of Australia‘s annual greenhouse gas emisisons every year for 100 years
>
> The Intergovernmental Panel on Climate Change estimates such forests held 217 tonnes of carbon per hectare, but the ANU report found Australia‘s forests stored an average of **640 tonnes per hectare**.
>
> In some areas, forests stored **2000 tonnes of carbon per hectare**.

Protecting these immense carbon stores - both in Australia and worldwide - is the cheapest and quickest form of emissions abatement available.

http://www.greenlivingpedia.org/Green_carbon

Old Growth Forests Are Valuable Carbon Sinks

ScienceDaily (Sep. 14, 2008) — Contrary to 40 years of conventional wisdom, a new analysis published in the journal Nature suggests that old growth forests are usually "carbon sinks" - they continue to absorb carbon dioxide from the atmosphere and mitigate climate change for centuries.

However, these old growth forests around the world are not protected by international treaties and have been considered of no significance in the national "carbon budgets" as outlined in the Kyoto Protocol.

That perspective was largely based on findings of a single study from the late 1960s which had become accepted theory, and scientists now say it needs to be changed.

"Carbon accounting rules for forests should give credit for leaving old growth forest intact," researchers from Oregon State University and several other institutions concluded in their report. "Much of this carbon, even soil carbon, will move back to the atmosphere if these forests are disturbed."

The analysis of 519 different plot studies found that about 15 percent of the forest land in the Northern Hemisphere is unmanaged primary forests with large amounts of old growth, and that rather than being irrelevant to the Earth's carbon budget, they may account for as much as 10 percent of the global net uptake of carbon dioxide.

In forests anywhere between 15 and 800 years of age, the study said, the net carbon balance of the forest and soils is usually positive – meaning they absorb more carbon dioxide than they release.

"If you are concerned about offsetting greenhouse gas emissions and look at old forests from nothing more than a carbon perspective, the best thing to do is leave them alone," said Beverly Law, professor of forest science at OSU and director of the

AmeriFlux network, a group of 90 research sites in North and Central America that helps to monitor the current global "budget" of carbon dioxide.

Forests use carbon dioxide as building blocks for organic molecules and store it in woody tissues, but that process is not indefinite. In the 1960s, a study using 10 years worth of data from a single plantation suggested that forests 150 or more years old give off as much carbon as they take up from the atmosphere, and are thus "carbon neutral."

"That's the story that we all learned for decades in ecology classes," Law said. "But it was just based on observations in a single study of one type of forest, and it simply doesn't apply in all cases. The current data now makes it clear that carbon accumulation can continue in forests that are centuries old."

When an old growth forest is harvested, Law said, studies show that there's a new input of carbon to the atmosphere for about 5-20 years, before the growing young trees begin to absorb and sequester more carbon than they give off. The creation of new forests, whether naturally or by humans, is often associated with disturbance to soil and the previous vegetation, resulting in decomposition that exceeds for some period the net primary productivity of re-growth.

Old growth forests, the study said, continue to sequester carbon for many centuries. And when individual trees die due to lightning, insects, fungal attack or other causes, there is generally a second canopy layer waiting in the shade to take over and maintain productivity.

One implication of the study, Law said, is that nations with significant amounts of old forests may find it somewhat easier to offset greenhouse gas emissions if those forests are left intact. It will also be necessary, she said, for land surface models that attempt to define carbon balance to better characterize function of old forests.

Many of the conclusions from the study were based on data acquired from the AmeriFlux and CarboEurope programs, researchers said. Multiple funding sources included the U.S. Department of Energy, CarboEurope, the European Union, and others. Authors were from institutions in the U.S., Belgium, Germany, Switzerland, France and the United Kingdom.

Story Source:

Adapted from materials provided by Oregon State University, via EurekAlert!, a service of AAAS.

---

http://www.sciencedaily.com/releases/2008/09/080910133934.htm

---

http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VICSC/2009/386.html#fn67

Supreme Court of Victoria

Environment East Gippsland Inc v VicForests [2009] VSC 386 (14 September 2009)

Last Updated: 14 September 2009

IN THE SUPREME COURT OF VICTORIA — Not Restricted

AT MELBOURNE

PRACTICE COURT

No. 8547 of 2009

ENVIRONMENT EAST GIPPSLAND INC — Plaintiff

v

VICFORESTS — Defendant

JUDGE:	FORREST J
WHERE HELD:	Melbourne
DATE OF HEARING:	1 & 2 September 2009
DATE OF JUDGMENT:	14 September 2009
CASE MAY BE CITED AS:	Environment East Gippsland Inc v VicForests
MEDIUM NEUTRAL CITATION:	[2009] VSC 386

PRACTICE and PROCEDURE – Interlocutory injunction – Whether serious question to be tried – Whether balance of convenience favours granting injunction – Injunction to preserve status quo – Logging of State forest – Obligation to conserve and manage flora and fauna habitat – Endangered species of potoroo - Standing of environment group – Obligations imposed by statute upon statutory corporation – *Conservation, Forests and Lands Act 1987* (Vic) – Flora *and Fauna Guarantee Act 1988* (Vic) – *Sustainable Forests (Timber) Act 2004* (Vic).

APPEARANCES	Counsel	Solicitors
For the Plaintiff	Ms D.S. Mortimer SC with Mr R.M. Niall	Bleyer Lawyers Pty Ltd
For the Defendant	Mr I. Waller SC with Mr H.L. Redd	HWL Ebsworth Lawyers as Agent for Komessaroff Legal Pty Ltd

HIS HONOUR:

Introduction

1 In the week commencing 7 September 2009, VicForests proposed to carry out logging of two coupes in State forest on Brown Mountain in East Gippsland.

2 Environment East Gippsland ("EEG") seeks an interlocutory injunction restraining

VicForests from carrying out operations in the two coupes as well as two others close by, which are designated for logging in the future. EEG asserts that such logging is unlawful, given the environmental obligations cast upon VicForests to protect native fauna.

3 The general area in which the coupes are located is a major habitat for native fauna, in particular: Long-footed Potoroo, Spot-tailed Quoll, Orbost Spiny Crayfish, Sooty Owl and the large Brown Tree Frog. Arguably, some of these threatened or endangered species may live in the coupes in which the logging operations are to commence. In particular, it is said that both the Long footed Potoroo ("the potoroo") and the Sooty owl have been detected in those areas.

4 The potoroo is an endangered and threatened species. [1] Their numbers are very small and they live only in the forests of the Great Dividing Range. The species is described as one of the rarest mammals in the world. The Sooty Owl is a medium to large barn owl that inhabits eucalypt forests on the eastern seaboard. It is also a threatened species. [2]

5 EEG asserts that given the likely presence of the potoroo and the sooty owl in the coupes, the logging operations are unlawful as they will breach a number of statutory provisions affecting the operations of VicForests, particularly those contained in the Sustainable Forests (Timber) Act 2004 (Vic) ("SFTA") and the Flora and Fauna Guarantee Act 1988 (Vic) ("FFGA").

6 In particular, EEG says that VicForests has failed to comply with the Code of Practice for Timber Production 2007 ("the code"), the East Gippsland Forest Management Plan ("the Plan") and action statements concerning individual species ("action statements") promulgated by the Department of Sustainability and Environment ("DSE") and the FFGA itself. It is said by EEG that particular parts of the respective codes or plans have the force of law and that the commencement of logging operations will necessarily result in breach of those provisions.

7 At the heart of EEG's application is detection of the potoroo and the sooty owl. Once there is evidence of the presence of either of the species within the particular coupes, the statutory obligations imposed upon VicForests are triggered, so the argument runs, and VicForests is obliged to comply with stringent obligations relevant to the preservation of their habitat.

8 VicForests contends that EEG has no standing. If it does, it says there is no serious question to be tried as no breach (actual or prospective) of particular obligations have been established which it disputes applies to it in any event. Finally, it says that the balance of convenience points to permitting the commencement of logging operations.

9 In the result, I have concluded that an interlocutory injunction should be granted in respect of the two coupes, but subject to a strict timeline in relation to the hearing of EEG's claim for a permanent injunction.

The parties

10 EEG is an incorporated association. Its members are active throughout East Gippsland operating in the field of environmental issues. It has 420 members and over 500 people on its email list. On 24 August 2009, it resolved to bring this proceeding against VicForests. [3] I shall say a little more about its operations when I examine the issue of standing.

11 VicForests is a statutory body established by an order of the Governor-in-Council on 28 October 2003 pursuant to s 14 of the State Owned Enterprises Act 1992 (Vic) (the SOE Act). It has the responsibility for carrying out logging operations in State forests. By cl 3(3) of the establishing order, VicForests is required to –

(a) undertake the sale and supply of timber resources in Victorian State forests and related management activities, as agreed by the Treasurer and the Minister, on a commercial basis;

(b) develop and manage an open competitive sales system for timber and resources; and

(c) pursue other commercial activities as agreed by the Treasurer and the Minister.

12 Pursuant to clauses 5 to 7 of the establishing order, VicForests must –

(a) operate in business or pursue its undertakings as efficiently as possible consistent with prudent commercial practice;

(b) be commercially focused and deliver efficient, sustainable and value for money services; and

(c) operate in the framework consistent with Victorian Government policy and priorities. [4] 13 VicForests carries out logging in the Brown Mountain area pursuant to the Plan. [5]

The proceedings

14 EEG"s generally endorsed writ was issued on 25 August 2009 and its summons seeking the interlocutory restraint of VicForests was issued on 28 August 2009.

15 The writ asserts that the Brown Mountain forestry operations are unlawful and in breach of statutory provisions. [6] The breach is said to be constituted by the actual and likely presence of the five identified species in the Brown Mountain area. In the course of argument and on the material adduced on the hearing, the central issue relates to the presence of the potoroo and the sooty owl in the area of the coupes. It is also said that VicForests failed to take into account the "precautionary principle", relevant available, scientific evidence and the fact that an Interim Conservation Order ("ICO") application had been made but not determined by the Minister. This latter matter was not relied upon in the course of the application.

16 EEG's summons seeks that VicForests be prohibited from undertaking any forestry operations in four coupes, two of which are about to be logged and another two, recently placed within a timber release plan. [7]

17 Any interlocutory order would be in effect until the trial of the action at which EEG will seek final orders to restrain VicForests from undertaking forestry operations in the Brown Mountain coupes and/or declaratory orders as to the unlawfulness of forestry operations in the coupes.

18 EEG relied upon five affidavits, namely, (a) two affidavits of Vanessa Bleyer, the solicitor for EEG, dated 24 August 2009 and 31 August 2009, (b) the affidavit of Jill Redwood, a member of the committee of EEG dated 28 August 2009, (c) an affidavit of Andrew Lincoln, a volunteer who undertakes native fauna species surveys dated 24 August 2009, and (d) an affidavit of Eliza Marie Poole, a zoologist dated 24 August 2009.

19 VicForests filed an affidavit of Cameron McDonald, its Director of Strategy and Corporate Affairs dated 31 August 2009 and during the course of the application a further affidavit of 2 September 2009. [8]

Brown Mountain

20 State forests are divided into three zones – [9]

(a) special protection zone (SPZ) to be managed for conservation, with timber harvesting excluded;

(b) special management zone (SMZ) to be managed to conserve specific features, while catering for timber production under certain conditions;

(c) general management zone (GMZ) to be managed for a range of uses, with timber production as high priority.

21 Brown Mountain is about 55 kilometres north-north-east of Orbost and is an area of natural beauty with considerable native flora and fauna. [10] It also holds substantial resources of native timber suitable for intense harvesting.

22 The Brown Mountain creek area is a catchment of approximately 450 hectares on the edge of the Errinundra Plateau in East Gippsland. It is State forest (with the exception of about 50 hectares which forms part of The Gap Scenic Reserve) and has been designated GMZ pursuant to the Plan. [11]

23 Attached to these reasons is a VicForests document showing the relevant coupes on Brown Mountain. The two coupes, 840-502-0015 ("15") and 840-502-0019 ("19") which VicForests proposes to log, are adjacent and are located to the east and west of the creek. Coupe 15 is 43.4 hectares in size and coupe 19, 21.5 hectares. [12] The shaded area on the western and eastern edges of each of the two coupes, running north, is a proposed SPZ announced by the Minister last week. [13] The proposal, as I understand it, is to log the balance of the areas of the two coupes not within the SPZ. The other two coupes, the subject of the proposed injunction are 840-502-0026 ("26") and 840-502-0027 ("27"). Coupe 26 is 21.4 hectares in size and coupe 27 is 5 hectares. Coupe 26 is located to the north of coupes 15 and 19, and coupe 27 is located to the south of coupe 15 (not shown on attached document).

24 Directly to the south of coupe 19 is coupe 840-502-0020 ("20"), which was logged at the end of October 2008. Photographs taken before and after the logging operations show the destruction of the natural habitat which appears to be a necessary consequence of such activity. [14]

25 Both coupes 15 and 19 are within a timber release plan approved by the Secretary of the DSE on 30 July 2004, as periodically amended. On 5 June 2009, a new timber release plan was approved by the Secretary to the DSE which included coupes 15 and 19 and added coupes 26 and 27. [15]

26 Between January and March 2009, officers or agents of the DSE conducted a survey of coupes 15 and 19 for arboreal mammals ("the DSE survey"). That survey was released in August 2009. [16]

27 On 21 August 2009, the Minister for Environment and Climate Change issued a media release concerning the Brown Mountain area. In particular:

> "Mr Jennings said the significant additional habitat protection measures, including extra wide 100 metre streamside buffers and the protection of the hollow bearing habitat trees identified by diversity officers, will be put in place at Brown Mountain creek area even though no threatened species were found during fauna surveys of the area". [17]

The Minister's statement accurately reflects the findings of the DSE survey, although, as will be seen, the authors" conclusion as to the absence of potoroos within the two coupes is less than unequivocal.

28 VicForests intended to start harvesting in coupes 15 and 19 in the week commencing 7 September 2009. [18] It has undertaken not to initiate harvesting pending the resolution of this application.

The statutory framework in which VicForests operates

29 It is necessary to refer, as concisely as possible, to the statutory framework under which VicForests operates when conducting logging operations, such as those proposed in the two coupes.

30 Under Part 3 of the SFTA, the Minister, by s 13, may allocate timber and State forests to

VicForests "for the purpose of harvesting and selling or harvesting or selling, timber resources". That order, known as an allocation order, permits VicForests to undertake timber harvest in particular areas of Victoria. Section 16 requires VicForests to carry out its functions in accordance with an allocation order. Section 15 sets out the requirements of an allocation order. In particular by s 15(1)(c) it is necessary for the allocation order to specify conditions applicable to VicForests in carrying out its functions. In this case the "allocation to VicForests 2004" order ("the allocation order") was made in July 2004 by the Minister with the following specified conditions. [19]

"In accordance with s 15(1)(c) of the Sustainable Forests (Timber) Act 2004, in undertaking authorised activities, VicForests is required to comply with the conditions and standards in the following documents as amended from time to time:

- *The Code of Forest Practices for Timber Production, Revision No. 2 1996*. Department of Natural Resources and Environment. [20]
- Management Guidelines as specified in the Forest Management Plans published by the Department of Sustainability and Environment or its predecessors, relevant to the forest management areas to which this change applies." [21]

31 Part 5 of the SFTA then sets out the scheme by which timber resources are to be managed by VicForests. Under s 42 the property in timber resources vests in VicForests.

32 Central to the management of timber resources by VicForests is the preparation of a timber release plan (s 37 and s 38) and its approval by the Secretary. VicForests is obliged to carry out its functions and powers in accordance with the timber release plan: s 44.

33 There are two relevant timber release plans, one of 30 July 2004 (subsequently amended on several occasions) and a new timber release plan approved on 5 June 2009 for 2009-2014, [22]. Each plan includes coupes 15 and 19. The new plan includes coupes 26 and 27. It also identifies many other coupes which will be harvested, the location and timing of proposed operations, the particular activities authorised by VicForests and attaches conditions to those operations. Included in those conditions are the following:

"In accordance with *s 15(1)(c)* of the *Sustainable Forests (Timber) Act 2004*, in undertaking authorised activities VicForests is required to comply with the conditions and standards in the following documents as amended from time to time. VicForests requests that any such amendments be made in consultation with VicForests.

- The *Sustainability Charter for Victoria State's Forests 2006*. Department of Sustainability and Environment.
- The *Code of Practice for Timber Production 2007*. Department of Sustainability and Environment.
- Management Guidelines as specified in Forest Management Plans published by the Department of Sustainability and Environment or its predecessors, relevant to the forest management areas to which this change applies." [23]

34 The SFTA, by s 45(1), introduces a concept of "authorized operations". This requires VicForests to carry out its activities in accordance with the relevant timber release plan, part of which I have just referred to: s 45(2). Section 45(1) makes it an offence to carry out harvesting operations which are not "authorized operations".

35 The application of the Code is also taken up by s 46 of the SFTA, found in Part 6 "Management of Timber Harvesting", which requires that VicForests "must comply with any relevant code of practice relating to timber harvesting".

36 The Minister, under s 31 of the Conservation, Forests and Lands Act 1987 (Vic) ("the CFLA"), is empowered to publish codes of practice relating to timber harvesting. It was common ground that the Code was published by the DSE under the hand of the Minister. It was the successor to the 1996 "Code of Forest Practices for Timber Production Revision No. 2".

37 It is convenient now to turn to parts of the FFGA. By s 19 it provides that the secretary must prepare an action statement, "for any listed taxon or community of flora or fauna". That action statement "must set out what has been done to conserve and manage that taxon, community or process and what is intended to be done and may include information on what needs to be done". In this case, there are action statements relating to four of the five relevant species, namely, the potoroo, the Orbost Spiny Crayfish, the Spot-tailed Quoll and the Sooty Owl. [24]

38 Section 26 of the FFGA enables the Minister to make an ICO to conserve the habitat of a listed taxon. Such an order had unsuccessfully been sought by EEG in respect of Brown Mountain.

39 Finally, in relation to the FFGA there is s 4 which sets out the objectives of flora and fauna conservation management in the State, including:

"(a) to guarantee that all taxa of Victoria's flora and fauna other than a taxa listed in the

Excluded List can survive, flourish and retain their potential for evolutionary development in the wild".

40 One other statutory provision needs to be mentioned. Section 22 of the Forests Act 1958 (Vic) requires a Forest Management Plans to be developed for particular areas. The relevant plan for East Gippsland was developed in December 1995. Compliance with it is, as has been seen, mandated by both the timber release plan and the allocation order.

41 In summary, in carrying out its logging activities in the coupes on Brown Mountain, VicForests is required, by a number of statutory routes, to comply with the conditions of the Code and the Plan. The Code then requires compliance with a relevant action statement.

The Code of Practice for Timber Production 2007 ("the Code")

42 The Code is set out over some 85 pages. It is carefully drafted and has Code principles with statements as to its purpose and its scope. It has many definition provisions and differentiates between mandatory and permissive requirements.

43 Under the heading "Why a Code of Practice for Timber Production?", the following is said:

"Maintaining the benefits to society provided by forestry depends on balancing community needs and concerns with careful stewardship and responsible management. The effective implementation of a Code of Practice helps to ensure that the activities of timber growing and harvesting are compatible with the conservation of the wide range of values associated with forests, and of any such values associated with land on which commercial plantation development is proposed."

44 The purpose of the Code is described as follows:

"The purpose of this Code of Practice is to provide direction and guidance to forest managers and operators to deliver sound environmental performance when undertaking commercial timber growing and harvesting operations in such a way that:

- permits an economically viable, internationally competitive, sustainable timber industry;
- is compatible with the conservation of the wide range of environmental, social and cultural values associated with timber production forests;
- provides for the ecologically sustainable management of native forests proposed for continuous timber production;
- enhances public confidence in the management of Victoria's forests and plantations for timber production."

45 The scope of the Code is defined as follows:

"The Code covers all timber production operations on both public and private land in Victoria. The Code aims to ensure that:

- native forest is adequately regenerated and managed following timber harvesting;
- impacts on environmental values (including soil, water, biodiversity) are avoided or minimised; and
- social and cultural values (Aboriginal cultural heritage places, historic places and landscapes) are maintained, protected and respected."

46 Within the Code Principles the following is found:

1. "Biological diversity and the ecological characteristics of native flora and fauna within forests are maintained.
2. The ecologically sustainable long-term timber production capacity of forests managed for timber production is maintained or enhanced."

47 The Code provides a series of explanatory notes, including the following under the heading "Terminology".

"**Mandatory Actions** are actions to be conducted in order to achieve each operational goal. Forest managers and operators must undertake all relevant mandatory actions to meet the objectives of the Code. Mandatory actions are focused on practices or activities. Failure to undertake a relevant Mandatory Action would result in non-compliance with this Code."
(Emphasis added).

I pause here to observe again that the Code is a carefully drafted document which patently seeks to impose obligations upon those who come within its purview. This is also reflected by Chapter 2. Under the heading “Environmental Values in Public Forests”, the following is said:

“This section includes requirements that must be observed during planning, tending, roading and harvesting of public forests.” [25]

48 Under the heading “Conservations of Biodiversity”, the Code reads as follows: [26]

“Operational Goal

Planning, harvesting and silvicultural operations in native forests specifically address the conservation of biodiversity, in accordance with relevant legislation and regulations, and considering relevant scientific knowledge.

Mandatory Actions

Where fire is used in timber production operations, all practicable measures must be taken to protect all areas excluded from harvesting from the impacts of unplanned fire.

Forest management planning and all forestry operations must comply with measures specified in relevant Flora and Fauna Guarantee Action Statements and Flora and Fauna Guarantee Orders.

Rainforest communities in Victoria must not be harvested. Rainforest communities must be protected from the impacts of harvesting through the use of appropriate buffers to maintain microclimatic conditions and protect from disease and other disturbance.

To facilitate the protection of biodiversity values, the following matters must be addressed when developing and reviewing plans and must be adhered to during operations:

- *application of the precautionary principle* to the conservation of biodiversity values, consistent with monitoring and research to improve understanding of the effects of forest management on forest ecology and conservation values;
- *consideration of the advice of relevant experts* and relevant research in conservation biology and flora and fauna management at all stages of planning and operations;
- use of wildlife corridors, comprising appropriate widths of retained forest, to facilitate animal movement between patches of forest of varying ages and stages of development, and contributing to a linked system of reserves;
- providing appropriate undisturbed buffer areas around significant habitats;
- maintaining forest health and ecosystem resilience by managing pest plants, pest animals and pathogens; and
- modifying coupe size and dispersal in the landscape, and rotation periods, as appropriate.” (Emphasis added.)

49 The precautionary principle, which must be adhered to both before and during operations, is defined in the glossary as follows: [27]

“Precautionary principle – when contemplating decisions that will affect the environment, the precautionary principle requires careful evaluation of management options 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.”

50 This brief analysis demonstrates, I suggest, that the clear purpose of the Code was to impose significant “mandatory” environmental obligations on VicForests at both the planning and operational level.

The Flora and Fauna Guarantee Action Statements (“the action statements”)

51 As mandated by the Code, forestry operations must comply with the measures set out in the Flora and Fauna Guarantee Action Statements. [28]

52 Pursuant to s 19 of the FFG, Action Statements were published in relation to the following species:

(a) the Sooty Owl, June 2001; [29]

(b) the Orbost Spiny Crayfish, December 2001; [30]

(c) the Spot-tailed Quoll, September 2003; [31]

(d) the Long footed Potoroo, August 2009. [32]

No action statement has been prepared for the large Brown Tree Frog.

53 It is not practicable to refer now to the terms of each of the action statements. It suffices to say that the document provides a relatively comprehensive analysis of the particular species and details matters such as description, distribution, habitat, life history and ecology, conservation status, threat, predation and past management actions. Of particular relevance are the intended management actions set out under "Conservation Objective". The most recent of the action statements relates to the potoroo; setting out some 14 specific actions under particular objectives. Such actions also appear to allocate responsibility to particular State Government organisations; for instance, DSE, Parks Victoria, VicForests and local government. Of particular relevance to this application is action 4:

"Protect Long-footed Potoroo habitat at detection sites on public land outside the Core Protected Area

Establish additional protected areas where Long-footed Potoroos have been detected in State forest or other public land outside the Core Protected Area. In State forest, apply the protection measures specified in Appendix 1. The protection measures will be formally reviewed in 2014.

Responsibility: DSE, VicForests"

54 Appendix I then provides:

"Prescriptions to be applied in State forest:

1. Each Long-footed Potoroo (LFP) detection site outside the Core Protected Area will generate a Special Management Zone (SMZ) of approximately 150 ha.
2. As far as possible, SMZ boundaries will follow recognisable landscape features such as ridges, spurs and watercourses.
3. Within each SMZ, at least one third (~50 ha) will be protected from timber harvesting and new roading.
4. This will be known as Long-footed Potoroo Retained Habitat.
5. The LFP Retained Habitat will include the best LFP habitat in the SMZ, which will generally be in gullies and on lower, sheltered slopes.
6. The LFP Retained Habitat may include areas otherwise unavailable for timber harvesting due to restrictions under the Code of Practice for Timber Harvesting.
7. The SMZ will also have a general restriction of one third of the total area that can be harvested in any three year period. If more than one coupe is to be harvested in an SMZ in the same year, the coupes must be separated by at least the equivalent of another coupe width.
8. The SMZ, with the LFP Retained Habitat clearly delineated, will be shown as part of the Forest Management Area zoning scheme.
9. The SMZ will be designed by DSE, in consultation with VicForests, and approved by DSE."

The East Gippsland Forest Management Plan ("the Plan")

55 The Plan has direct application to VicForests by virtue of the allocation order and the timber release plan. Parts of the Plan focus on the preservation of the biodiversity of East Gippsland.

56 The Plan is a carefully considered document which identifies major issues such as sustainable timber supply, low volume forest, old growth forest, national estate, sites of biological significance, rainforest conservation and threatened and sensitive fauna.

57 Chapter III of the Plan deals with biodiversity conservation. One paragraph from that chapter demonstrates the contest in this case:

"Resolution of debate over how timber production and nature conservation can be integrated to achieve ecologically sustainable forest management is the most pressing forest management issue in the FMA and Australia". [33]

58 Chapter III is also well thought out and specific. It is noted that -

“Conservation guidelines have been developed for threatened or sensitive species with major habitat requirements in State forest and whose needs may not be fully met by other conservation strategies (featured species)”.

59 The purpose of the guidelines is said to be -

“Provide planned protection for sensitive and threatened species in State forest to meet the requirements of the *Flora and Fauna Guarantee Act 1988* and the precautionary principle outlined in the National Forests Policy Statement”.

and to

“initiate an orderly process for ongoing reconciliation of timber production with conservation of threatened species”. [34]

60 There is specific reference in the conservation guidelines to the potoroo. The management strategy and the action statement are applicable and in particular -

“Accordingly 400 to 500 hectares around confirmed sites will be protected. These will be sub-catchment units containing suitable habitat (includes rainforest, Wet Forest or Damp Forest) timber harvesting, new roading and most fuel reduction burning will be excluded. Areas identified in State forest will be included in the Special Management Zone (SMZ) or in the Special Protection Zone (SPZ) where they coincide with other values”.

61 Under the heading “Birds”, the Sooty Owl receives special attention; “they are potentially sensitive to the effects of clear felling and may be among the most difficult fauna to conserve in production forest”. The guideline in relation to a Sooty Owl habitat is as follows:

“Approximately 500 ha of forest dominated by old trees and generally comprising Lowland, Damp and Riparian forests, and Warm Temperate Rainforest. Where the SPZ or SMZ is based on a known owl locality 500 ha is to be located within a 1000 ha area that includes the detection site.”

Principles relevant to the grant of an interlocutory injunction

62 There was no dispute between the parties as to the applicable principles. They were identified by the High Court in Australian Broadcasting Corporation v O’Neill [35] and can be summarised as follows:

(a) The plaintiff must demonstrate that there is a serious question to be tried. It must prove, prima facie, a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial. In the context of this case it must show that it has a putative legal or equitable right in respect of which final relief is sought. [36]

(b) The injury which the plaintiff is likely to suffer must be one that damages will not provide an adequate remedy.

(c) The balance of convenience must favour the granting of an injunction. The balance of convenience requires a consideration of the relevant matters favouring or militating against the granting of an injunction and will necessarily involve a consideration of the strength of the plaintiff"s claim assuming that a serious issue has been identified. In Victoria, this consideration is explained further by the decision of the Court of Appeal in Bradto Pty Ltd v State of Victoria. [37] The Court must, in determining whether to grant an interlocutory injunction, “take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong, in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial”. [38]

(d) There may be other discretionary considerations which militate against the grant of the injunction.

Is there a serious question to be tried?

63 Three issues arise in determining whether EEG has demonstrated that there is a serious question to be tried in the sense of establishing a prima facie case against VicForests, as explained in ABC v OiNeill. [39]

The standing of EEG to bring the claim

64 It was not in issue that the principles set out by Sackville J as to standing in North Coast Environment Council Inc v Minister for Resources, [40] should be applied in this case.

65 In that case, after reviewing the decisions of the High Court of Australia in Conservation Foundation Inc v The Commonwealth [41] and Onus v Alcoa Australia Limited, [42] his Honour set out the following matters relevant to determination of the standing of an environmental organisation which sought to impugn, under the Administrative Decisions (Judicial Review) Act, the grant of a licence for the export of woodchips:

"First, North Coast must demonstrate a 'special interest' in the subject matter of the action. A 'mere intellectual or emotional concern' for the preservation of the environment is not enough to constitute such an interest. The asserted interest must go beyond that of members of the public in upholding the law and must involve more than genuinely held convictions.

Secondly, a person may be able to demonstrate a 'special interest' in the preservation of a particular environment. For this purpose, as *Onus v Alcoa* allows, an intellectual or emotional concern is not disqualification from standing to sue.

Thirdly, to the extent (if any) that north coast relies on possible non-compliance with the *Administrative Procedures*, neither the Environment Protection Act (with the possible exception of s 10) nor the *Administrative Procedures* themselves confer any private rights enforceable by individuals. An allegation of non-compliance with the Environment Protection Act or *Administrative Procedures* is not enough of itself to confer standing on North Coast.

Fourthly, the fact that a person makes comments on an EIS produced pursuant to directions given under the *Administrative Procedures* does not of itself confer standing on that person to challenge or complain of a decision resulting from the environmental assessment process.

Thus, North Coast‟s role as a commentator on Sawmillers‟ draft EIS does not, without more, confer standing to challenge the decision to grant Sawmillers an export licence or, presumably, to require reasons for such a decision.

Fifthly, an organisation does not demonstrate a special interest in the environment sufficient to establish standing simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment. Otherwise, it is likely that the ACF would have had standing to complain of the decision to approve the exchange control transaction relating to the development at Farnborough." (Citations omitted). [43]

66 Sackville J then identified a number of the factors which led to his conclusion that the plaintiff had standing. [44]

- It was a peak environmental organisation.
- It was recognised by the Commonwealth as a significant and responsible environmental organisation.
- It had received Commonwealth grants and had been recognised by the Government of New
- South Wales as a body that should represent environmental concerns on advisory committees.
- It coordinated or conducted projects and conferences on matters of environmental concern.
- It had made submissions on forestry management issues.

67 Central to the determination of this issue is that mere "intellectual or emotional" concern is insufficient to found standing. Nor is it enough to rely solely on the objects of the particular association or complaints that may have been made in the past about the subject matter. What is vital is "the importance of its (the plaintiff‟s) concern with the subject matter, the decision and the closeness of its relationship to that subject matter". [45]

68 EEG relies upon its specific involvement in the Brown Mountain area. [46] Its objects and purposes are to "promote conservation values and environmental awareness about East Gippsland"; it has consulted with government and campaigned for many years in relation to the preservation of the wildlife in the area; it has conducted many walks and treks through Brown Mountain and the coupes and provides ecology camps; it has a large number of members devoted to the preservation of the endangered and threatened species located through the area; it is invited by Government to comment on ecological issues; and its activities in the area (both in terms of representations to government and its use of the mountain) make it uniquely placed to represent the areas ecological value. Indeed, the EEG rhetorically asks, if it does not represent the interests of the native habitat and fauna on Brown Mountain, who will?'

69 VicForests points to a number of distinctions between EEG and the North Coast Environment Council, which was found to have standing. EEG is not a peak body; it has had no recognition by government as to its authority in representing environmental issues. It has not received governmental funding. VicForests submits that EEG's only real concern is intellectual or emotional, and as such it cannot have standing in a proceeding such as this.

70 Accordingly, VicForests says that EEG lacks standing and this is fatal to the application. I do not agree. Whilst I accept that EEG is not a peak body and does not have a close relationship to the Victorian State Government (in terms of advice or funding), these matters are not determinative of this issue. Whether a particular organisation has standing or not will depend on the facts of the case and most importantly the nature of its relationship with the subject matter of the dispute.

71 I am mindful that I only need to be satisfied on this point on a prima facie basis and I am not determining the issue at a final hearing. It seems to me that EEG□s level of membership, constant activities on Brown Mountain (including its conducting of fauna surveys), regular communications with government concerning the area and the fact that it appears to be the only body directly interested in the preservation of the area's natural habitat demonstrates in a practical sense, that it has an arguable case to bring this proceeding.

The extent of the obligation imposed on VicForests by the statutory regime

72 VicForests contend that many of the obligations apparently imposed upon it amount to statements of principle, rather than specific responsibility. It was said that such obligations are "imperfect" and that there can be no question of it acting contrary to any legal obligation in commencing the logging operations.

73 Insofar as EEG relies upon s 4(2) of the FFGA, I agree with VicForests' submission. An objective within the statute, notwithstanding the use of the word "guarantee", could not, I think, create a statutory obligation.

74 However, the position is considerably different, certainly on a prima facie basis, in relation to the responsibilities imposed upon VicForests (via the SFTA) by the Plan, the Code and the action statements.

75 I have set out their provisions in some detail, as I think it necessary to understand that these are far from lofty statements of principle, but rather, given the inherent tension between principles of conservation and logging, are designed to set out precisely the manner in which VicForests will carry out its logging,. This is particularly so, it seems to me, where there is a question of whether a threatened or endangered species habitat will be affected.

76 I think it is distinctly arguable that parts of the Code and the action statements I have referred to have application to VicForests logging activities where there is the detectable presence of a species to which the particular obligation applies.

77 I will deal with each relatively briefly. The action statements [47] are patently specific. Once the particular species is detected, then specific obligations are cast upon particular agencies of government including statutory authorities. Whilst I accept that there may be a real distinction as to which obligations contained within the action statements are cast upon particular statutory bodies (e.g. DSE, Parks Victoria, VicForests), the reference within the action statement to a specific entity does not, I think, necessarily remove the obligation of VicForests to comply with provisions of the action statement, particularly as three of the action statements were published prior to VicForests' establishment. For present purposes, I do not have to resolve this issue, as it seems there is a prima facie case that, at the very least, once a species is detected, then each of the matters contained in the relevant action statements needs to at least be considered by VicForests. Moreover, it is clearly arguable that where VicForests is specifically identified, as is the case with the potoroo action statement 4, it must take the mandated action once it is aware of detection.

78 I also think that there is a prima facie case that the Code (apart from requiring compliance with the action statements) imposes obligations upon VicForests.

79 Arguably, the mandatory actions provisions of the Code requiring the application of the precautionary principle and the consideration of relevant scientific evidence create statutory obligations. I have set out in some detail those provisions as it seems to me that there is a case, particularly given the vulnerability of the species, that these requirements must be applied by VicForests in the event of detection of a threatened or endangered species in the preparation or running of operations. That is not to say that upon more careful analysis and with more evidence, a contrary conclusion may be reached, but at the very least there is a prima facie case that it is

necessary for VicForests to apply the precautionary principle and to consider relevant scientific evidence in the event of detection within a coupe.

80 I am not persuaded that the reference to the precautionary principle is, at least on the analysis required for this application, simply a statement of objective or lofty principle. The decision of the Western Australian Supreme Court in Bridgetown/Greenbushes Friends of the Forest v Conservation and Land Management [48] is distinguishable in that it involved a considerably different statutory regime. It is the terms of the Code and the emphasis on the mandatory nature of the obligation on VicForests both before and during operations that satisfies me that there is a prima facie case that it was obliged to comply with the Code in relation to both the application of the precautionary principle and the consideration of expert evidence relevant to the area the subject of logging.

81 Finally, there is the Plan, parts of which clearly descend into sufficient detail in relation to particular species. Arguably, it may also create a statutory obligation if that species is identified within the areas to be logged. The creation of an SMZ or SPZ in areas where particular species are identified is spelt out – and this applies directly to potoroos and Sooty Owls.

82 In summary, I am satisfied that there is a prima facie case that the provisions of the action statements, the Code and the Plan create lawful obligations upon VicForests with which it must comply when carrying out logging operations in the two coupes. For reasons that will become clear, it is not necessary at this time for me to resolve questions as to the applicability of other statutory provisions to VicForests operations.

Breach of the obligations – arguable unlawful conduct

83 Central to whether EEG can demonstrate an arguable case is evidence of the presence of the potoroo and the Sooty Owl within the two coupes. Absent evidence of their presence in the coupes, it is difficult to see how there could be a relevant breach. Indeed, putting aside the requirement of consideration of scientific evidence as mandated in the Code, the obligations (arguably) cast upon VicForests must, depend upon an identification of the habitat and the presence of the particular species within the relevant coupes. Otherwise, the obligations would be meaningless and impossible to apply.

84 EEG relies upon the evidence of Mr Lincoln and Ms Poole as to the identification of the potoroo in the coupe. During 2009, Mr Lincoln conducted surveys which he provided to the DSE. Subsequently, on 14 August, he set up a camera which filmed activity near the Brown Mountain creek separating the two coupes. He used infrared and motion sensor cameras. [49] A still photograph was also taken from the footage. Ms Poole, a qualified zoologist, has examined the film and the photograph and concluded:

“Based on my knowledge of Victorian marsupials and previous experience with potoroos, the most likely explanation is that the animal in question is a potoroo. ... I am confident in my opinion that the animal on film is a Long-footed potoroo”. [50]

85 Mr McDonald of VicForests accepted that the camera was located within the 100 metre buffer area (SPZ) which will apply to coupe 15. [51]

86 The evidence of Ms Poole and Mr Lincoln is corroborated, to some extent, by the DSE survey conducted between January and March of this year. [52]

87 Although the DSE, in the course of its survey, did not detect a potoroo within the coupe, the authors, Mr Henry and Mr Mitchell of the Biodiversity Group of the DSE, made the following observation:

“The non-detection of Long-footed Potoroos must be interpreted with caution. The survey was implemented using standard methodology and level of effort and it had a high probability of detecting the species if it was present. However the species can be very difficult to detect – often detections are not confirmed until a third or even fourth return visits to a site, despite the presence of diggings which are strongly suggestive of the species presence. Some diggings of this type were seen in the study area, and the forest type was assessed as good quality habitat for Long-footed Potoroos. A confirmed Long-footed Potoroo site also occurs immediately to the west of the study area, on the other side of

Leggs Road, and thus it is plausible that the species may be present at the site.” [53]

88 I am satisfied, on the basis of the evidence I have identified above that there is an arguable case that a potoroo or potoroos are present in or about the areas of the two coupes (remembering that the two coupes are adjacent and beside the creek). The detection of a potoroo in one of the coupes

makes it likely, I think, that it or they may be inhabiting the other coupe. The detection of a potoroo enlivens, at the very least, the application of the potoroo action statement.

89 VicForests contended that the declaration by the Minister of an SPZ 100 metres to the east and west of the Brown Mountain creek dividing the two coupes was sufficient to comply with its obligations [54] under the action statement. [55] The requirement, once there is detection, is to comply with the provisions of the appendix. [56] For my part, at least on this application, I am not satisfied that the mere declaration of this area constitutes appropriate compliance with the wide range of requirements identified in the appendix, particularly those relating to the creation of a potoroo habitat. These requirements mandate careful consideration of the establishment of a habitat in the coupes. I think EEG has an arguable case on this issue.

90 Nor am I satisfied that the declaration of the SPZ satisfied the obligations cast upon VicForests by other parts of the Code. The detection of the potoroo raises the question of VicForests application of the precautionary principle in relation to its logging activities as set out in the Code. [57] It seems to me that there is at least an arguable case that once the presence of the particular species is noted, then there is an obligation upon VicForests to comply with that principle in determining whether to commence or continue with operations. [58]

91 Finally, the detection of the potoroo may engage the management strategy contained in the plan [59] requiring the protection of confirmed sites of the potoroo in areas of up to 400 to 500 hectares. How this provision is to be interpreted is not altogether clear to me, but it also reflects the overarching conservation obligation on the part of VicForests once a potoroo is detected.

92 I have therefore concluded that, given the detection of the potoroo, EEG has established a prima facie case in the sense explained in O Neill v ABC, that VicForests would be in breach of its obligations imposed by the Code and the action statement if it commenced logging in coupes 15 and 19 this week.

93 EEG also argued that the report of Dr Meredith [60] was relevant to the question of breach as it constituted an expert report which VicForests was obliged to consider. The report is entitled "Assessment of Critical Habitat for Six Species Under the Flora and Fauna Guarantee Act in the Bonang-Goongerah area, East Gippsland, Victoria". This report essentially deals with the declaration of Brown Mountain as critical habitat under the FFGA. Whilst it was prepared in April 2009, it seems clear that it first came to the notice of VicForests in the course of this proceeding.

94 I am not prepared at the present time to conclude one way or another as to whether the obligation to consider expert advice and research as required by the Code extends as far as to require VicForests to deal with every report drawn to its attention, whilst preparing or continuing logging operations, particularly where such a report emerged only in the course of legal proceedings and was apparently prepared for use in litigation.

95 In the light of my conclusion as to the arguable breach of statutory obligations in respect of the potoroo, I need only deal briefly with the question of the presence of the Sooty Owl in the coupes, It has not been sighted by DSE officers or by any of the volunteers who conducted surveys of coupes on Brown Mountain. [61] However, one volunteer has apparently heard the owl within coupe 15. [62] It is not at all clear at the present time, as to whether it inhabits the area, in the sense of roosting or nesting. This would be necessary, I think, to trigger the application of the various statutory obligations.

96 EEG placed no real reliance upon the detection of the other species. In any event, given my conclusion in relation to the presence of potoroo, it is not necessary to deal with the presence or otherwise of those species and any potential breaches of statutory obligations.

97 Finally, I should also add that I am not persuaded that there is any potential breach of the obligations imposed on VicForests in respect of coupes 26 and 27. The evidence does not disclose detection of the potoroo or the Sooty Owl in those coupes. Moreover, there is no probative material that VicForests plans to carry out operations in these coupes in the near future. [63]

Balance of convenience/Minimum risk of injustice

98 VicForests pointed to a number of matters which militate against the granting of an injunction. They were as follows.

99 First, the primary case of EEG is weak and further there is a risk that EEG will fail at trial in establishing that it has the requisite standing. I accept that the question of standing may be a real consideration at trial. However, I am not otherwise persuaded that there is such weakness in EEG s case for this to be a decisive consideration.

100 Second, VicForests has a statutory obligation to log State forests. This area has been designated for logging for some time and contracts entered into. It will suffer a sizeable financial loss as set out by Mr McDonald, if prevented from doing so. [64] Weather patterns mean that the beginning of September is the preferable time for carrying out the logging of the coupes. There is a risk, depending on the season, that if prevented from logging, that it will not be able to meet its contractual commitments. I accept that VicForests will suffer financially if an interlocutory injunction is granted. I also accept that contractors and customers will be disadvantaged. However, I am not persuaded that the extent of the disadvantage is as significant as set out by Mr McDonald. There seems little hard evidence that there will be any true contractual issues (either with contractors or customers) as a result of the loss of these two coupes to logging this year. Even if I am wrong about that, and in the event that EEG's claim fails, the fact remains that VicForests retains the asset which, presumably, can be harvested at a later time (say next year). Notwithstanding my observations during the course of the hearing, no material was provided by VicForests to indicate what loss it would suffer on a deferral basis. Rather, it elected to provide figures on the basis of a total loss of production and the impact on contractors. Whilst I take into account that there will be a real financial impact upon VicForests and contractors, I am not satisfied that it is as severe as Mr McDonald maintains.

101 Third, 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 [65] 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. [66]

102 There is an extraordinarily powerful consideration in favour of granting an interlocutory injunction. I have referred previously to the photographs tendered in relation to the logging of coupe 20. [67] I readily acknowledge that logging operations are lawful activities and in carrying out those activities there will be consequential destruction of native flora and the habitat of native fauna. The photographs, however, demonstrate the apparent total obliteration of the area of native forest as a result of logging and the subsequent burning off. To put it bluntly, once the logging is carried out and the native habitat destroyed, then it cannot be reinstated or repaired in anything but the very, very long term. An award of damages is, of course, irrelevant.

103 In Slater Walker Superannuation Pty Ltd v Great Boulder Mines Limited, [68] Lush J said:

"There will be other situations in which, though the plaintiff's proof of his rights or the infringement of them is not strong, an injunction may be granted because to withhold it would do the plaintiff irreparable harm, while to grant it would not greatly injure the defendant. The possible variety of situations is unlimited."

104 Irreparable harm will be done to the habitat of the native fauna, and particularly that of the detected potoroo. I accept that there will be significant financial ramifications for VicForests by the granting of an interlocutory injunction, but, as I have said, that needs to be balanced against the irreversible damage that will be caused to the habitat, bearing in mind that the potoroo is an endangered and threatened species.

105 I am persuaded that the balance of convenience strongly favours the granting of an interlocutory injunction to preserve the status quo until final hearing. Further, the lesser risk of injustice test points directly to the preservation of the status quo.

106 In reaching this conclusion, I have thought long and hard about the adverse economic consequences to VicForests, its customers and its contractors. Notwithstanding these matters I have formed the firm opinion that the legislature intended that its logging operations be carried out with clear and specific consideration of the environmental impact of such an enterprise upon threatened species; a potential breach of these guidelines runs contrary, I think, to the underlying policy of the Code, the Plan and the action statements. Whether, of course, there has in fact been a breach of the applicable provisions (as may be found by the trial judge) will be determined at a full hearing of EEG"s claim.

Other discretionary considerations

107 VicForests urged several other considerations which tell against the granting of the injunction.

108 First, it referred to the principle that equity will not intervene where there is a breach of the criminal law. Section 45(1) of the SFTA creates an offence where a person carries out harvesting

operations unless they are authorised operations. Section 44 requires that VicForests' operations comply with the timber release plan. However, the alleged unlawful activities of VicForests are not solely confined to its asserted failure to comply with that plan. As I have sought to explain, the source of VicForests' obligations comes from a variety of statutes and documents, rather than one specific statute which gives rise, in the case of breach, to a criminal penalty. I do not think that there is much in this point.

109 Secondly, it relied upon the proposition that there are alternative remedies that could have been pursued by EEG. In particular, it says that EEG had, up until shortly prior to the issue of this proceeding, focused on trying to persuade the Minister to make an ICO under the FFGA. It pointed to a number of letters written on behalf of EEG to the Minister threatening judicial review, particularly in relation to the Minister's failure to make an ICO in relation to Brown Mountain. It said that judicial review was the appropriate form of relief and that it should be directed at the Minister. I do not find this submission persuasive. The nub of EEG's argument is that there are stringent conditions attached to the logging of pristine native forest such as Brown Mountain, and that once the existence of endangered or threatened species is made out, then those obligations cannot be avoided. It is not a case for judicial review, but rather for curial intervention if the proposed logging of the coupes is ultimately demonstrated to be unlawful. Merely because there was a change of tack by EEG at a late point of time does not seem to me to militate strongly against interlocutory relief, provided the prima facie case is made out.

Conclusion

110 It is appropriate to grant an interlocutory injunction restraining VicForests from carrying out timber harvesting operations in coupes 15 and 19. I am not persuaded that the injunction should be any wider, as on the material I cannot apprehend the danger of any immediate logging operations in the other two coupes - nor are they within immediate proximity of 15 and 19.

111 I am also firmly of the view that a strict timetable should be set in relation to the trial of this proceeding. Given VicForests' legitimate concerns as to the worth of any undertaking as to damages and its potential economic detriment as a result of the granting of the injunction, the trial should be held as soon as is practicable. I propose to discuss with counsel the best way in which to advance the case, with a view to having a trial conducted early in 2010.

[1] Endangered under the *Environment Protection and Biodiversity Act* 1999 (C"wealth) and threatened under FFGA.

[2] Under the FFGA.

[3] Affidavit of Jill Redwood, 28 August 2009 ("Redwood affidavit") [2], [5] and [6].

[4] Affidavit of Cameron McDonald, 31 August 2009 ("first McDonald affidavit"), [3]-[8].

[5] First McDonald affidavit [15].

[6] [5] and [6] of these reasons.

[7] See paras [32] and [33] of these reasons.

[8] Second McDonald affidavit".

[9] First McDonald affidavit [14].

[10] Report of Dr Charles Meredith, Biosis research, Exhibit JR39.

[11] First McDonald affidavit, [13].

[12] Exhibit VEB8, [18] to the affidavit of Vanessa Elizabeth Bleyer, 24 August 2009.

[13] First McDonald affidavit [16]-[20].

[14] Exhibit VEB20 and VEB21.

[15] McDonald first affidavit [16]-[20].

[16] Exhibit EMP3 to the affidavit of Eliza Marie Poole, 24 August 2009.

[17] McDonald first affidavit [30].

[18] McDonald first affidavit [23].

[19] Exhibit VEB3; clause 6.

[20] The Code was amended in 2007 and is now entitled "Code of Practice for Timber Production".

[21] I have only reproduced the references to documents relevant to this application.

[22] Exhibit CM16.

[23] I have only reproduced the references to documents relevant to this application.

[24] Exhibits VEB 13, 14, 15, and 16.

[25] Clause 2.2.

[26] Clause 2.2.2.

[27] Page 78.

[28] See [48] of these reasons.

[29] Exhibit VEB16.

[30] Exhibit VEB15.

[31] Exhibit VEB14.

[32] Exhibit VEB12.

[33] Exhibit VEB 11, 3.1.

[34] Exhibit VEB11, 3.4.

[35] [2006] HCA 46; (2006) 227 CLR 57 Gleeson CJ and Crennan J [19], [65]-[83] per Gummow and Hayne JJ. See also *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618.

[36] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199, [8]-[13].

[37] [2006] VSCA 89; (2006) 15 VR 65.

[38] *Bradto Pty Ltd v State of Victoria* [2006] VSCA 89; (2006) 15 VR 65*; Tymbook Pty Ltd v State of Victoria* [2006] VSCA 89; (2006) 15 VR 65 [35]. See also *Magna Alloys and Research Pty Ltd v Coffey* [1981] VR 23.

[39] [2006] HCA 46; (2006) 227 CLR 57, see [65]-[69].

[40] [1994] FCA 1556; (1994) 55 FCR 492.

[41] (1980) 146 CLR 493.

[42] [1981] HCA 50; (1981) 149 CLR 27.

[43] [1994] FCA 1556; (1994) 55 FCR 492, 512-513.

[44] [1994] FCA 1556; (1994) 55 FCR 492, 512-513.

[45] (1994) FCR 492, 512.

[46] Redwood affidavit [2]-[5].

[47] [51]-[54] of these reasons.

[48] (1997) 18 WAR 102, per Wheeler J.

[49] Affidavit of Andrew Lincoln, 24 August 2009 [4].

[50] Affidavit of Eliza Poole, 24 August 2009 [18].

[51] McDonald first affidavit, [39].

[52] EMP3 to the affidavit of Eliza Poole.

[53] Page 9 Exhibit EMP3 to affidavit of Eliza Poole 24 August 2009.

[54] McDonald first affidavit [40] in a hearsay form relying upon advice from a DSE officer.

[55] See [27].

[56] See [41].

[57] Clause 2.2.2 of the Code.

[58] See the observations as to the application of the precautionary principle of Osborn J in *Western Water v Rosen* [2008] VSC 382, *[107-*]109].

[59] See [60] of these reasons.

[60] Exhibit JR39.

[61] Exhibits JR17, JR24, JR26, JR27.

[62] Exhibit JR17.

[63] McDonald first affidavit [23].

[64] Mc Donald first affidavit, [41]-[46], McDonald second affidavit, [6]-[12], CM17.

[65] McDonald first affidavit [48].

[66] See *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, 243.

[67] Exhibits VEB20 and VEB21.

[68] [1997] VR 107, 110.

---

http://www.theage.com.au/environment/judge-likens-gippsland-logging-to-the-somme-20090914-fnvg.html

Judge likens Gippsland logging to the Somme

ADAM MORTON

September 15, 2009

Brown Mountain after logging.

A Supreme Court judge has compared images of a felled forest with a World War I battlefield before ordering a temporary ban on logging in a hotly contested part of East Gippsland.

Environmentalists claimed a historic victory after winning an injunction over logging of two zones of old-growth forest at Brown Mountain, seen as a symbolic battleground by greens and the timber industry.

The injunction will stand until a trial to test whether the logging would pose a threat to endangered species, particularly the long-footed potoroo.

Justice Jack Forrest said the case had been strengthened by photographs showing the "apparent total obliteration" of a nearby site during logging and subsequent burning off.

"To put it bluntly, once the logging is carried out and the native habitat destroyed, then it cannot be reinstated or repaired in anything but the very, very long term," he said.

Earlier, Justice Forest told the court: "I know what it was like before and I know what it was like after, and I've also seen pictures of the battlefields of the Somme."

State-owned timber agency VicForests had planned to start logging at the mountain this month after Environment Minister Gavin Jennings lifted a moratorium over most of the disputed area.

Mr Jennings reasoned that government surveys had found no direct evidence of threatened species in the logging zones.

Anti-logging campaigners Environment East Gippsland subsequently produced video footage that they said showed a long-footed potoroo in the areas to be felled.

Justice Forrest yesterday agreed it was arguable that potoroos were present, and granted an injunction until a trial either later this year or early in 2010.

It will be the first time a Victorian court has been asked to grant a permanent injunction against state-sanctioned logging.

Environment East Gippsland co-ordinator Jill Redwood said the case could have wider implications than the 60 hectares under dispute. "We're hoping this is kind of litmus test for a lot of areas that are known to support rare wildlife and old-growth," she said.

VicForests corporate affairs director Cameron Macdonald said he accepted the basis for the interim injunction.

Just 5000 hectares of Victorian forest were harvested each year and logged areas regenerated, he said. "The reality is if you look at a photo of a burnt coupe I defy anyone to say it looks appealing, but you have to look at the totality … In harvesting these areas we generate benefits to the community."

Mr Macdonald said the injunction would force VicForests to substitute lower-quality forest in its short-term logging schedule.

But Justice Forrest said that the losses to contractors would not be as bad as the nearly $220,000 Mr Macdonald had claimed.

Argument about a security payment to cover damages, in case the environment group loses, will be heard on Thursday.

Judge's Findings in the Brown Mountain Case:

http://www.austlii.edu.au/au/cases/vic/VSC/2009/421.html

Environment East Gippsland Inc v VicForests (No. 2) [2009] VSC 421 (29 September 2009)

Last Updated: 29 September 2009

Do Not Send for Reporting

IN THE SUPREME COURT OF VICTORIA — Not Restricted

AT MELBOURNE

PRACTICE COURT

No. 8547 of 2009

ENVIRONMENT EAST GIPPSLAND INC — Plaintiff

v

VICFORESTS — Defendant

JUDGE:	FORREST J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 September 2009

DATE OF JUDGMENT:	29 September 2009
CASE MAY BE CITED AS:	Environment East Gippsland Inc v VicForests (No. 2)
MEDIUM NEUTRAL CITATION:	[2009] VSC 421

PRACTICE and PROCEDURE – Interlocutory injunction – Whether security in addition to an undertaking in relation to damages should be given by the plaintiff – Public interest considerations.

APPEARANCES	Counsel	Solicitors
For the Plaintiff	Ms D.S. Mortimer SC with Mr R.M. Niall and Ms J Forsyth	Bleyer Lawyers Pty Ltd
For the Defendant	Mr I. Waller SC with Mr H.L. Redd	HWL Ebsworth Lawyers as Agent for Komessaroff Legal Pty Ltd

HIS HONOUR:

Introduction

1 On 14 September 2009, I determined that it was appropriate to grant an interlocutory injunction restraining VicForests from carrying out timber harvesting operations in coupes 15 and 19 of Brown Mountain. [1]

2 The plaintiff, Environment East Gippsland Inc ("EEG"), in the course of the hearing of its application, proffered the usual undertaking as to damages.

3 However, VicForests contends that such an undertaking is inadequate and accounts for little, if anything, given EEG's financial position and the overwhelming likelihood that EEG may fail to obtain a permanent injunction. As a condition to the granting of the injunction, VicForests contends that EEG should lodge an amount of between $93,000 and $163,000 with the Court as security. [2]

4 I have concluded that security should not be ordered. This case is brought in the public interest; importantly, it involves consideration of the obligations (imposed by State legislation) of a State statutory corporation to comply with principles of conservation as they affect an endangered species. Accordingly, this is an exceptional case and EEG should not be required to provide security in addition to the usual undertaking as to damages.

Further affidavit material

5 Both EEG and VicForests sought to file additional material on this application. VicForests sought to rely upon a further affidavit of Mr Cameron MacDonald, [3] its director of Strategy and Corporate Affairs. Mr MacDonald had filed two previous affidavits in this application. The new affidavit seeks to explain in greater detail, the potential losses alleged to be suffered by VicForests if an interlocutory injunction is granted preventing logging in the coupes.

6 Whilst I accepted that the material contained within the affidavit was untested, as Ms Mortimer pointed out, I regarded its contents as relevant to the question of the provision of security and gave leave to VicForests to rely upon it.

7 EEG also seeks to rely upon a fresh affidavit sworn by Ms Bleyer, [4] its solicitor. That affidavit attaches an email from an officer of the Department of Sustainability and the Environment ("DSE") relating to the number of saw logs which could be extracted from the two coupes. I regarded the affidavit as admissible on this application and gave leave to EEG to rely upon it as it is relevant to the estimate provided by Mr MacDonald regarding potential loss of profits.

Background

8 In my earlier reasons, I noted that the estimates of EEG's assets varied from $10,000 to $45,000; I assumed, given the costs involved with the proceeding, that there would be "no money available to satisfy the undertaking as to damages". [5]

9 I also expressed some doubt as to the quantum of VicForests' loss of profits given that the asset (i.e. the timber within the two coupes) remains to be harvested at a later date, if EEG"s claim fails. [6]

10 In Mr MacDonald's second and third affidavits, he deposes to the estimated losses which VicForests would suffer as a result of a delay in the logging of coupes 15 and 19. Central to Mr MacDonald's calculations are the months of September to November, which are critical for VicForests in meeting its budgeted harvest. A delay of up to six months will inevitably mean a significant loss of profits. Mr MacDonald estimates those losses of profits to be $23,334 if one month's delay, $93,336 for three months' delay, and $163,338 if there is six months' delay. [7]

11 The trial of the primary claim will be heard in the Supreme Court at Sale in either December of this year or March 2010.

Relevant principles

12 In Air Express Limited v Ansett Transport Industries (Operations) Pty Ltd, [8] Gibbs J said regarding the purpose of requiring an undertaking as to damages when granting an interlocutory injunction:

"The object of requiring a plaintiff who seeks an interlocutory injunction to enter into an undertaking of this kind is to attempt to ensure that a defendant will receive compensation for any loss which he suffers by reason of the grant of the injunction if it appears in the event that the plaintiff was not entitled to obtain it. The insistence upon the giving of an undertaking is a very important, if not essential, means of preventing injustice from being done by the court when it makes an order at an interlocutory stage, before the rights of the parties have been finally determined. The court has a discretion not to enforce such an undertaking, but unless the defendant has been guilty of conduct that would render it inequitable to enforce the undertaking it would seem just, speaking generally, that a plaintiff who has failed on the merits should recompense the defendant for the damage that he has suffered as the result of the making of the interlocutory order".

13 Subsequently, in Combet v Commonwealth of Australia, [9] Heydon J said:

"In my judgment, the Court will almost always decline to grant an interlocutory injunction unless the plaintiff undertakes to the Court to pay any damages which the Court may later assess as necessary to compensate the defendant for any harm caused by the interlocutory injunction in the event that the Court at the final hearing refuses to grant a final injunction. The importance of the undertaking is that without it a defendant ultimately successful at the final hearing would not be able to recover damages for any loss suffered by complying with the interlocutory injunction." [10]

14 In First Netcom Pty Ltd v Telstra Corporation Ltd, in relation to the provision of security where the undertaking may be of dubious value, the Full Court of the Federal Court said: [11]

"However since its terms are a matter for the discretionary judgment of the court, its provisions will be moulded so as to fit the circumstances of the case at hand. These circumstances may include the likelihood of the plaintiff's insolvency, which might produce an inability to discharge any liability to the party enjoined pending a final hearing that might accrue under the undertaking. In that event, the court is required to exercise its judgment as to what is an appropriate order to ensure the reality of adequate compensation, and not merely an empty form of compensation, to a party who is ultimately successful.

In such a case the court may stipulate a further condition in connection with the undertaking, in the event that the plaintiff should elect to give the undertaking, and thus secure the injunction. The extra condition could be that any contingent liability under the undertaking be appropriately secured ... Again, the plaintiff can elect to comply with this condition or decline to do so, but must accept the consequences of its election."

15 In Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2), [12] Dodds-Streeton J noted that a condition relating to an undertaking (be it the undertaking simpliciter or the undertaking with appropriate security) could not be imposed retrospectively and that:

"All a Court may do is refuse the injunction if the undertaking is declined. It cannot require the provision of security, but may refuse an injunction if security or other relevant condition is declined".

16 In most cases it will be necessary for a plaintiff to provide the undertaking or, where applicable, security. However, there are cases where exceptional circumstances will mandate dispensing with either the undertaking or security. In Blue Wedges Inc v Port Melbourne Corporation [13] Mandie J, when speaking of the provision of an undertaking said:

"In my opinion a fundamental consideration on this application for an interlocutory injunction is that no viable undertaking as to damages is or can be offered by the plaintiff. Such an undertaking is required save in exceptional circumstances. It is convenient to refer to, and I adopt, what was most recently said in that regard in the High Court by Heydon J in *Combet v Commonwealth of Australia*. I can conceive that in some circumstances an interlocutory injunction might be granted without requiring the usual undertaking as to damages if there was a manifest breach of the law threatened. It might then be in the public interest to grant such an injunction without requiring the usual undertaking as to damages. Likewise if there was a proven danger of irremediable harm or serious damage an interlocutory injunction might perhaps be granted in some circumstances without the undertaking being required."

17 I think the same principle must apply where the worth of any undertaking is seriously in issue and the question of appropriate security is raised; namely, are there exceptional circumstances which warrant departure from the general rule that a party, either by undertaking alone or with security, ensures that its opponent will not be out of pocket if the primary claim fails.

18 Of course the granting of an injunction and its terms necessarily depend upon the nature of the case being considered. In determining whether exceptional circumstances have been shown, the Court will examine the strength of the plaintiff's case on a prima facie basis while ensuring such considerations do not inhibit the function of the trial judge. The Court will also examine the nature of the damage which the plaintiff seeks to prevent or will suffer if the injunction is not granted, and, in the context of this litigation, whether there is an issue of public importance or public interest that would count against ordering security over and above the undertaking.

19 As has been seen, in the vast majority of cases involving private litigants, the question of an appropriate undertaking and/or the need for a security will be of considerable importance in determining whether to grant the injunction. However, in proceedings involving public interest issues, that consideration may not be as great. There is a line of authority in the Land and Environment Court of New South Wales to this effect. For instance, in Ross v State Rail Authority of NSW, [14] Cripps CJ said:

"Where a strong prima facie case had been made out that a significant breach of an environmental law has occurred, the circumstance that an applicant is not prepared to give the usual undertaking as to damages is but a factor to be taken into account in considering the balance of convenience."

20 Subsequently in Oshlack v Richmond River Council and Irongates Developments Pty Ltd, [15] Stein J said:

"For justice to be administered through open standing provisions it was and remains necessary for the Court to review any unreasonable procedural barriers to public participation. One such example is the traditional requirement for an applicant to give an undertaking as to damages upon an application for an interlocutory injunction. The requirement had its origins in private litigation in order to do justice to strike a balance between the competing private interests. However, applicants in public interest litigation have no private interest in the proceeding. Their prime motivation is to seek to uphold the public interest in the rule of law. In *Ross v State Rail Authority*, Cripps J held that in recognition of the public interest nature of the litigation the offering of an undertaking for damages was but one factor to be considered in the balance of convenience. *Ross* has been repeatedly followed in the Court in public interest cases."

21 More recently in Tegra (NSW) Pty Ltd v Gundagai Shire Council, [16] Preston CJ said:

"The appropriateness of requiring an applicant to give an undertaking as to damages may vary depending upon the nature of the proceedings. In public interest, environment proceedings, it may be less appropriate."

Analysis

22 The thrust of VicForests' submission is that if EEG fails in its primary claim and the undertaking is not secured, then it will sustain losses of between approximately $20,000 and $160,000. I have previously concluded that it is inevitable that VicForests will suffer a real financial loss as a result of its inability to harvest coupes 15 and 19 this season. However, I am not convinced that the losses are as great as Mr MacDonald sets out, notwithstanding the fresh material contained in the third

affidavit. The reality is that VicForests retains the asset even though it cannot harvest the coupes this year.

23 Mr MacDonald's estimate of the loss of profits [17] is based upon an inability to harvest the timber this year or early next year. His estimate is untested, but, more importantly, the question of the level of loss, assuming that harvesting can occur next year, is couched in conclusionary and what appears to be only partially substantiated opinion. For instance, Mr MacDonald swears, in relation to the losses:

"It is unlikely that VicForests will ever be able to recover these losses." [18]

The substantiation for this opinion seems to be contained in paragraph [8] of his second affidavit:

"This profit is not recovered in subsequent financial years as it is dependent on both customers being willing to accept any shortfall in subsequent years and VicForests' ability to produce additional volume over and above base contract commitments in subsequent financial years."

Mr MacDonald refers to a discussion with one of his customers who apparently asserted that "some customers" have opted to obtain saw logs from alternative suppliers. [19] The further elaboration in paragraphs [6]-[8] of his third affidavit does not assist me in identifying the basis for his figures. Indeed, the email attached to Ms Bleyer's most recent affidavit (untested as it is) indicates that there may be an issue as to the amount of sawn logs to be harvested from the coupes. [20]

24 This combination of hearsay, untested and somewhat difficult to follow supposition is, I think, unconvincing as to the level of loss.

25 Moreover, there is no suggestion by Mr MacDonald that VicForests will be liable for any contractual penalty to either its customers or its contractors. Rather, it runs a real risk of not being able to recoup its loss of profits for this year in the following years if it is unable to harvest coupes 15 and 19 over the next few months.

26 Whilst I accept that the inability of VicForests to harvest coupes 15 and 19 will produce financial disadvantage, I am not persuaded, given the preservation of the asset and the quality of the timber (which VicForests says exists on Brown Mountain), that the losses are as great as predicted by Mr MacDonald.

27 Notwithstanding my scepticism as to the level of loss asserted by VicForests, the question still remains whether security in a modest amount should be ordered.

28 I have set out at [12]-[21] the principles relevant to provision of security. In my view, EEG has established exceptional circumstances in the context of this case. I say that for the following reasons.

29 The difficulty in balancing the economic benefits of the logging of native forests to both the State's economy and regional communities as against the preservation of endangered native fauna is well recognised in the community. The statutory obligations cast upon VicForests seem to me to be intended to achieve a balance between these two seemingly irreconcilable interests. The statements of principle contained in the action statements, the code and the plan demonstrate the clear legislative intent that protecting threatened or endangered species such as the potoroo is particularly important. The purpose of the legislation and the incorporation of the various documents is to afford a significant degree of protection to a native species, if detected. This is important in this consideration.

30 Second, and this flows from the first point, there is the issue of the public interest in the protection of threatened and endangered species. That interest is reflected, to a considerable extent, in the legislation I have referred to in my earlier reasons. As the statements by members of the New South Wales Land and Environment Court demonstrate, public interest litigation may be differentiated from that concerned with the enforcement of private rights.

31 Third, to make an order that EEG provide security, even in a modest sense, will probably stultify its ability to conduct its case against VicForests and therefore run contrary to the public interest.

32 Fourth, there is a genuine risk of irremediable harm or serious damage to the potoroo, an endangered and threatened species. It may not be a "proven danger", but on the material that I have referred to in my previous reasons, there seems to be a genuine risk that its habitat may be destroyed if the harvesting commences.

33 Finally, I have concluded that there is a prima facie case that VicForests may, if it carries out its harvesting operations in the two coupes, breach several statutory obligations. True it is that it may

not be a “manifest breach” as Mandie J described nor a continuing breach, but there is, given the evidence of detection, at least an arguable breach if the harvesting goes ahead.

34 I note that this case is factually quite different to that considered by Mandie J in Blue Wedges. EEG is a long-standing environmental group and has demonstrated a sufficiently sound case to preserve the status quo, which was not the case in Blue Wedges.

35 I should add that I do not think that there is any force in the submission made on behalf of EEG that VicForests, in making its submission as to the provision of security, was acting contrary to a “model litigant” code. Not only was there no evidence as to the contents of the code or as to whether it applied to VicForests, it seems to me that this is not an issue for the Court to determine on an application such as this. Rather, it is an issue, if it is one at all, between VicForests’ legal advisers, VicForests itself and perhaps the relevant Minister. It has no relevance as to whether, and on what terms, an injunction should be granted.

Conclusion

36 For the reasons which I have endeavoured to articulate, I have taken the view that it would be inappropriate to order EEG to provide security over and above its undertaking as to damages.

---

[1] [2009] VSC 386.

[2] T15.

[3] Affidavit of Cameron MacDonald 14 September 2009.

[4] Affidavit of Vanessa Bleyer 17 September 2009.

[5] [2009] VSC 386 [101].

[6] [2009] VSC 386 [100].

[7] Affidavit of Cameron McDonald 14 September 2009 [4], [8] and [9], referring to Exhibit CM17.

[8] [1981] HCA 75; (1981) 146 CLR 249, 311-312. For a brief account of the history of the practice of extracting an undertaking as to damages, see *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295, *360.*

[9] [2005] HCATrans 459, p 27, see also Stephen J *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* [1981] HCA 75; (1981) 146 CLR 249 at 318-319.

[10] See also *First Netcom Pty Ltd v Telstra Corporation Ltd* [2000] FCA 1269; (2000) 179 ALR 725 [22].

[11] [2000] FCA 1269; (2000) 179 ALR 725 [23].

[12] [2004] VSC 341 [130]-[133].

[13] [2005] VSC 305 [11].

[14] (1987) 70 LGERA 91, 100.

[15] (1994) 82 LGERA 236, 243.

[16] [2007] NSWLEC 806; (2007) 160 LGERA 1 [29]..

[17] Affidavit of Cameron MacDonald Exhibit CM17.

[18] Affidavit of Cameron MacDonald 14 September 2009 at [4].

[19] Affidavit of Cameron MacDonald 14 September 2009 at [8].

[20] See [7] of these reasons.

---

http://www.eastgippsland.net.au/?q=forests_forever

EEG vs VICFORESTS IN SUPREME COURT

Landmark court case could alter forest management for rare wildlife

On Tuesday 25th August 2009 Environment East Gippsland commenced proceedings against VicForests in the Supreme Court of Victoria asking the Court for a permanent injunction to stop VicForests from logging Brown Mountain. We are also asking the Court to declare that the logging of Brown Mountain is unlawful.

Brown Mountain is known habitat for threatened and vulnerable wildlife which must be protected under government laws. Donations are urgently needed to support the court case that is now going ahead. For more information see Brown Mt Court Case pages or click on the burnt logged coupe above on the right.

After 13 years, a 5 yearly review!

Exactly thirteen years ago today 3rd Feb 2010) Australia's first Regional Forest Agreement was signed for East Gippsland. This RFA has seen the logging industry decline and promises broken for the environment. It paved the way for ongoing conflict and legal challenges.

"After 13 years of violating this agreement, the state government has finally announced a posthumous performance review – seven years overdue. This would have to win the prize for the most contravened government document in history , said Environment East Gippsland's Jill Redwood "This should be a Monty Python sketch, not a serious government process".

"The governments need to agree it's been a waste of $300 million to produce reports full of flawed resource data and commitments that were mostly ignored. Its main achievement was the increased volume of export woodchips leaving East Gippsland's forests."

"The obligation was for 'world class protection of old growth and biodiversity'. Instead there have been ongoing protests, an inability to obtain eco-certification of the logging (by a world certifying body), reduced funding to research threatened species, thousands of hectares of old growth converted to industrial woodchip crops, no sustainability checks despite claims of sustainable logging, and the recent legal injunction on logging the habitat of protected wildlife at Brown Mountain".

"We were told millions of dollars would flow to the region, hundreds of jobs would be created, and logging would be sustained forever , said Ms Redwood. —What we've seen is the opposite, including admissions of incorrect data and overestimates of available sawlog resource, as well as serious regeneration failure. From 22 mills in the region back then it's now down to about six, but woodchipping hasn't slowed down ".

"Since the RFA was signed 13 years ago, only woodchip volumes increased in East Gippsland. Mr Brumby needs to acknowledge the RFAs are ill-formulated, poorly researched, shamelessly dishonoured, fully redundant and transparently political" .

http://www.envlaw.com.au/brown_mountain.htm

Brown Mountain Logging Case

This case study involves a current proceeding in the Victorian Supreme Court to restrain logging at Brown Mountain in East Gippsland, Victoria, 300km East of Melbourne (a location map is available here). The case forms part of an extensive history of litigation against logging in the East Gippsland.

Environment East Gippsland Inc (EEG), a conservation group, alleges that proposed logging by VicForests, a government-owned corporation operated by the Victorian Government, is unlawful. EEG relies particularly on the Sustainable Forests (Timber) Act 2004 (Vic) and the Flora and Fauna Guarantee Act 1988 (Vic).

Old growth forest at Brown Mountain
Photo: Peter Campbell, 2008

Due to the need to restrain the logging occuring prior to the trial, EEG applied for an interlocutory injunction. This stage of the proceedings involved three main issues:

- Whether EEG had standing to bring the action;
- Whether there was a serious question to be tried; and
- Whether the balance of convenience favoured the grant of the interlocutory injunction.

Forrest J granted an interlocutory injunction, finding:

> "There is an extraordinarily powerful consideration in favour of granting an interlocutory injunction. ...
>
> The photographs [of logging tendered by EEG] demonstrate the apparent total obliteration of the area of native forest as a result of logging and the subsequent burning off. To put it bluntly, once the logging is carried out and the native habitat destroyed, then it cannot be reinstated or repaired in anything but the very, very long term."

Forrest J likened the photographs of logging, some of which are shown below, to " pictures of the battlefields of the Somme".

Forrest J subsequently refused to order EEG to provide security for damages should the interlocutory injunction remain in force and and EEG fails to succeed at trial. He found:

> "I have concluded that security should not be ordered. This case is brought in the public interest; importantly, it involves consideration of the obligations (imposed by State legislation) of a State statutory corporation to comply with principles of conservation as they affect an endangered species. Accordingly, this is an exceptional case and EEG should not be required to provide security in addition to the usual undertaking as to damages."

The matter is expected to proceed to trial in early 2010.

Key documents in this case include:

Court documents

- Generally endorsed Writ issued 25 August 2009
- Summons seeking interlocutory restraint of the logging issued on 28 August 2009

EEG evidence for interlocutory injunction

- Affidavit of Jill Redwood, EEG coordinator, on standing and correspondence on logging (without exhibits)
- Affidavit of Venessa Bleyer, EEG solicitor, on statutory framework for litigation (without exhibits)
- Affidavit of Venessa Bleyer, EEG solicitor, exhibiting photographs of logging (without exhibits - some exhibited photographs shown to the right)
- Affidavit of Andrew Lincoln, EEG volunteer, on surveys of Brown Mountain fauna (without exhibits)
- Affidavit of Eliza Poole, zoologist, identifying species found in surveys of Brown Mountain (without exhibits)

VicForests evidence for interlocutory injunction

- Affidavit of Cameron MacDonald, VicForests Director, on timber allocation and conservation issues on Brown Mountain and commercial losses if logging prevented (without exhibits)
- Affidavit of Cameron MacDonald, VicForests Director, on need for logging to proceed without delay (without exhibits)
- Affidavit of Cameron MacDonald, VicForests Director, on loss of profits if logging delayed (without exhibits)

Interlocutory judgments

- Decision granting an interlocutory injunction: Environment East Gippsland Inc v VicForests [2009] VSC 386 (Forrest J).
- Map annexed to judgment by Forrest J showing the location of logging coupes 840-502-0015 and 840-502-0019 the subject of the proceedings and the interlocutory injunction.
- Decision refusing to order security for damages: Environment East Gippsland Inc v VicForests (No. 2) [2009] VSC 421 (Forrest J).

Further details of the history of the case along with maps, pictures and film footage of logging at Brown Mountain, are available at Greenlivingpedia.

Photographs of logging at Brown Mountain tendered in evidence and likened by Forrest J to "pictures of the battlefields of the Somme".

Photos courtesy of Environment East Gippsland Inc