

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

Not Restricted

S ECI 2020 02658

KINGLAKE FRIENDS OF THE FOREST INC.
(ABN 35 186 838 481)

Plaintiff

v

VICFORESTS

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 24 June 2020
DATE OF RULING: 26 June 2020
CASE MAY BE CITED AS: Kinglake Friends of the Forest Inc. v VicForests
MEDIUM NEUTRAL CITATION: [2020] VSC 394

ENVIRONMENTAL LAW – Application for interim injunction – Timber harvesting in State forest coupes – Whether serious question to be tried that defendant failing to screen timber harvesting operations from view, in breach of statutory forestry management standards – Whether serious question to be tried that harvesting not in accordance with statutory timber release plan – Balance of convenience – Interim injunctions granted – *Sustainable Forests (Timber) Act 2004* (Vic), ss 37, 38, 44, 45, 46 – Code of Practice for Timber Production 2014 – Management Standards and Procedures for timber harvesting operations in Victoria’s State forests 2014, cl 5.3.1.5.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Korman	McMullan Solicitors
For the Defendant	Ms FJ Hudgson	Russell Kennedy

HER HONOUR:

- 1 Kinglake Friends of the Forest Inc. (**Kinglake FF**) is an incorporated association 'established for people who want to learn about, discuss and advocate for the preservation of the native forests in Kinglake and the Central Highlands'.¹ **VicForests** is a Victorian Government owned business, whose purpose is to 'sustainably manage the State's renewable timber resources for the long-term environmental, social and economic benefit of all Victorians'.²
- 2 In this proceeding, Kinglake FF seeks a declaration and a permanent injunction in respect of timber harvesting by VicForests that it alleges is in contravention of the *Sustainable Forests (Timber) Act 2004* (Vic), the **Code** of Practice for Timber Production 2014, and the Management **Standards** and Procedures for timber harvesting operations in Victoria's State Forests 2014. By summons filed on 23 June 2020, Kinglake FF sought interim injunctions restraining VicForests' timber harvesting operations in 14 coupes in State forest in the Central Highlands forestry management area. The summons was supported by two affidavits of Kinglake FF's president, Susan McKinnon, and a further affidavit of its solicitor.
- 3 I heard Kinglake FF's application for an interim injunction in the Practice Court on 24 June 2020. At that hearing, VicForests relied on two affidavits of its General Counsel, Natalie Naylor, prepared in the very short time available before the hearing. At the conclusion of the hearing, I made orders granting interim injunctions restraining VicForests from felling or cutting trees, as specified in the orders, until 5:00pm on 14 July 2020.³ My reasons for making those orders follow.

¹ Affidavit of Susan Mary McKinnon dated 22 June 2020 (**First McKinnon affidavit**), Exhibit SMM-1 – Resolutions passed on 16 August 2019 and 2 September 2019 by the unincorporated Kinglake Friends of the Great Forest.

² Affidavit of John McMullan dated 23 June 2020, Exhibit JM-1 – VicForests Annual Report, 2018-19, 4. VicForests is a State body established under s 14 of the *State Owned Enterprises Act 1992* (Vic) by Order in Council dated 28 October 2003: *Conservation, Forests and Lands Act 1987* (Vic), s 3(1) – definition of 'VicForests'.

³ The interim injunctions ordered are set out in full at [50] below.

4 The parties accepted that an interim injunction should only be granted if Kinglake FF could establish that:

- (a) there was a serious question to be tried that VicForests was harvesting timber in contravention of the Act, the Code, or the Standards, and would continue to do so unless restrained; and
- (b) the balance of convenience favoured granting an injunction.⁴

5 In relation to the balance of convenience, the parties accepted that the Court should 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'.⁵

6 In summary, I am satisfied that there are serious questions to be tried that:

- (a) VicForests is failing or will imminently fail to screen timber harvesting operations from view in ten coupes, contrary to cl 5.3.1.5 of the Standards; and
- (b) VicForests is harvesting or will imminently harvest six coupes in a way that is not in accordance with the current timber release plan and is not authorised by the Act.

I consider that the balance of convenience favours granting interim injunctions, although in more confined terms than was sought by Kinglake FF.

7 VicForests reserved its position as to whether Kinglake FF has standing to seek the relief set out in the writ. I am satisfied that there is a serious question to be tried on that issue.

⁴ *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [65].

⁵ *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65, [35].

Serious question to be tried – Failure to screen

- 8 The Act provides a framework for sustainable forest management and sustainable timber harvesting in Victoria's State forests.⁶ Section 46(a) of the Act requires VicForests to comply with the Code.
- 9 The Code was adopted in 2014 by the then Minister for Environment and Climate Change in order to:⁷
- ... provide direction to **timber harvesting managers, harvesting entities and operators** to deliver sound environmental performance when planning for and conducting commercial timber harvesting operations in 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 forests;
 - provides for the ecologically sustainable management of **native forests** proposed for cyclical timber harvesting operations; and
 - enhances public confidence in the management of timber production in Victoria's forests and plantations.
- 10 The Code applies to the planning and conducting of all commercial timber production and timber harvesting operations on both public and private land in Victoria. Compliance with the Code is 'mandatory for any person planning for or conducting a timber harvesting operation on State forest'.⁸
- 11 The Code incorporates the Standards, in order 'to provide detailed mandatory operational instructions, including region specific instructions for timber harvesting operations in Victoria's State forests'.⁹ The Standards is a document providing standards and procedures 'to instruct managing authorities, harvesting entities and operators in interpreting the requirements of the Code'.¹⁰ It covers planning and record keeping; water quality, river health and soil protection; biodiversity; other values; roading; timber harvesting; fire salvage harvesting; and forest regeneration

⁶ *Sustainable Forests (Timber) Act 2004* (Vic) (the Act), s 1(a).

⁷ Code of Practice for Timber Production 2014, 22 [1.2.2].

⁸ Code, 23 [1.2.6]; Act, s 46.

⁹ Code, 23 [1.2.6].

¹⁰ Standards, 21 [1.2.1.1].

and management.

12 Kinglake FF alleges that VicForests is currently conducting, or will imminently conduct, timber harvesting operations in ten coupes in the Central Highlands forestry management area, in breach of cl 5.3.15 of the Standards, and hence in contravention of the Code, and s 46(a) of the Act. The breach alleged is a failure to screen timber harvesting operations from view, by means of a 20 metre wide vegetation buffer.

13 Section 5 of the Standards sets out standards to be met in relation to 'Other Values' such as historic places, landscape, giant trees, and recreation. Section 5.3 provides specific landscape standards for six separate forestry management areas. Clause 5.3.1, in relation to the Central Highlands forestry management area, provides:

5.3.1 Central Highlands FMAs

5.3.1.1 Retain all **mature** trees within 20 m of the Monda Track.

5.3.1.2 Apply a 50 m **buffer** either side of La La Falls walking track.

5.3.1.3 Apply a 50 m buffer either side of Island Creek walking track and a 100 m buffer around the Ada Tree.

Foreground (0 – 500 m)

5.3.1.4 Within 500 m of the scenic drives and designated lookouts listed in table 9 in Appendix 5 the Planning Standards, manage timber harvesting operations to ensure landscape alterations are temporary, subtle and not evident to the casual observer.

5.3.1.5 Screen timber harvesting operations (except **selective harvesting** operations) and new road alignments from view. Use a minimum 20 m vegetation buffer with particular emphasis on the sensitive landscape features listed in table 9 in Appendix 5 the Planning Standards.

Middleground (500 m – 6.5 km)

5.3.1.6 In the middle ground, between 500 m and 6.5 km, seen from the features listed in table 9 in Appendix 5 the Planning Standards:

(a) manage timber harvesting operations to ensure landscape alterations are only subtly apparent within 5 years of the operation; and

(b) shape, position and time timber harvesting operations and new roads to minimise their visual impact.

14 I was informed that none of the coupes the subject of this proceeding were in close proximity to any of the sensitive landscape features listed in Table 9.

15 The Standards adopt the definition of ‘buffer (strip)’ in the Code’s glossary, as follows.¹¹

‘buffer (strip)’ means a protective margin of vegetation excluded from any harvesting activity abutting a **waterway** or an area of **rainforest** or other special area, which protects it from potentially detrimental disturbances in the surrounding **forest**. Buffer width is defined as horizontal distance from which various **timber harvesting operations** are excluded.

16 The effect of cl 5.3.1.5 of the Standards was at issue in *Friends of Leadbeater’s Possum Inc. v VicForests (No 4)*.¹² In that case, VicForests contended that the minimum 20 metre buffer requirement only applies to the landscape features in Table 9. It makes the same contention in this case, although it was not accepted by Mortimer J in *Leadbeater’s*:¹³

Clause 5.3.1.4 imposes a specific prescription relating to “scenic drives and designated lookouts in table 9”. Unlike cl 5.3.1.4, cl 5.3.1.5 contains a general prescription in the first sentence, which is then qualified in two ways. The first is by reference to the minimum size of the buffer, set at 20 m. The second qualification refers to table 9. Its meaning is plain in my opinion – all timber harvesting operations (and new road alignments) are to be screened from view, and the minimum screening is 20 m. In addition, by reference to table 9 and for “sensitive landscape features” set out in table 9, additional screening is required, over and above the 20 m minimum.

17 Kinglake FF relies on this judicial interpretation of cl 5.3.1.5. It is of course open to VicForests to argue that it should not be followed in this case. However, I must accept that there is a serious question to be tried that cl 5.3.1.5 imposes a general obligation on VicForests to screen timber harvesting operations from view, by means of a 20 metre vegetation buffer within which timber may not be harvested.¹⁴

18 Kinglake FF relies on the following evidence that VicForests is, or will imminently, conduct timber harvesting in the ten coupes without maintaining a 20 metre buffer

¹¹ Code, 11.

¹² [2020] FCA 704 (*Leadbeater’s*).

¹³ *Leadbeater’s*, [1270].

¹⁴ See also *Warburton Environment Inc. v VicForests* [2020] VSC 337, [18]–[19].

from all roads and tracks from which the harvesting operations might be viewed:

- (a) VicForests' published monthly schedule for the north-east region lists the following coupes for harvesting in June 2020:¹⁵
- (i) Moustache 320-503-0024;
 - (ii) Crusoe 284-502-0008;
 - (iii) Port 301-537-0006
 - (iv) Carbonara 283-505-0003;
 - (v) Watering Can 301-539-0001;
 - (vi) Charmander 282-512-0007
 - (vii) Mariner 283-503-0024;
 - (viii) Nellie 297-518-0001;
 - (ix) Neils Flower 301-520-0002;
 - (x) Barcelona 313-503-0002
- (b) In respect of the Watering Can coupe, Ms McKinnon exhibited to her first affidavit a video of part of that coupe taken from Main Mountain Road on 18 June 2020 at about 5:27 pm. The video clearly shows that trees have been felled within 20 metres of the road.
- (c) In respect of each coupe, Ms McKinnon exhibited to her affidavit a set of three maps – one from the Forest Protection Survey Program website showing the location of the coupe, and two from the Google Maps website showing the roads and tracks through and adjoining the coupe.

¹⁵ First McKinnon affidavit, [15], Exhibit SMM-39.

- (d) With one exception, VicForests' published operations maps for the Carbonara, Watering Can, Charmander, Mariner, Nellie, Neils Flower, and Barcelona coupes do not include any buffer between the coupe and roads or tracks from which timber harvesting operations may be viewed. The exception is the operations map for the Nellie coupe, which shows a buffer along the Melba Highway, but no other road or track. It appears that VicForests has not published operations maps for the Moustache, Crusoe, and Port coupes.
- (e) VicForests' position in this proceeding, as it was in *Leadbeater's*, is that cl 5.3.1.5 only requires it to maintain a 20 metre vegetation buffer from the sensitive landscape features listed in Table 9.

19 On 18 June 2020, VicForests gave an undertaking to Kinglake FF not to fell or cut trees in the Watering Can coupe within 20 metres of Main Mountain Road. According to its General Counsel, it did not undertake to maintain a buffer along the other two roads in the coupe because 'the requested 20 metre buffer had already been harvested along two of the three roads'.¹⁶ During the hearing on 24 June 2020, VicForests through its counsel proffered an undertaking not to fell or cut trees within 20 metres of all three roads in the Watering Can coupe. No undertaking was proffered in respect of any of the other nine coupes.

20 VicForests submitted that there was no evidence that it would not apply a 20 metre 'visual amenity buffer' in coupes other than Watering Can. It pointed to the lack of evidence that members of the public used the roads or tracks in the other coupes, and argued that many of the tracks exist solely to provide access to the forest for timber harvest operations. It accepted, however, that these tracks were access tracks on unreserved Crown land that members of the public are entitled to use.¹⁷

21 I am satisfied that there is a serious question to be tried whether VicForests is failing to screen its timber harvesting operations in the ten coupes listed above, as required

¹⁶ Affidavit of Natalie Laura Naylor dated 23 June 2020, [3].

¹⁷ See *Gray v Minister for Energy, Environment & Climate Change* [2020] VSCA 121, [41]–[42].

by cl 5.3.1.5 of the Standards. It is plain that VicForests does not consider that it is obliged to screen timber harvesting operations from view along all roads and tracks within and adjoining coupes, despite Mortimer J's conclusions in *Leadbeater's*.¹⁸ There is direct evidence and an admission by VicForests that it has not done so in the Watering Can coupe, where logging is now in progress. The operations maps for six other coupes do not include a buffer along any of the roads and tracks identified by Kinglake FF, with the exception of a buffer in the Nellie coupe where it adjoins the Melba Highway. An inference can be drawn from this evidence that VicForests is failing or will fail to screen the remaining three coupes from view in accordance with cl 5.3.1.5.

Serious question to be tried – Harvesting not authorised by timber release plan

22 All timber resources in State forest are the property of the Crown.¹⁹ Property in timber passes to VicForests when the Minister makes an allocation order under s 13 of the Act.²⁰ Section 37(1) of the Act requires VicForests to prepare a plan in respect of an area to which an allocation order applies, for the purposes of:

- (a) harvesting and selling, or harvesting or selling, timber resources; and
- (b) undertaking associated management activities in relation to those timber resources.

23 The plans prepared under s 37 are known as timber release plans. VicForests is obliged to ensure that a plan prepared under s 37 is consistent with the allocation order to which it relates and the Code.²¹

24 The current allocation order requires VicForests to consult with traditional owner groups, the local community, the Department of Environment, Land, Water and Planning, the Department of Jobs, Precincts and Regions, and the relevant land manager in preparing or changing a timber release plan.²² The consultation required

¹⁸ *Leadbeater's*, [1263]–[1272].

¹⁹ Act, s 12A.

²⁰ Act, s 14.

²¹ Act, s 37(3).

²² Act, s 37(2); Allocation (Amendment) Order 2019, published in Government Gazette No. S 153, 24 April 2019, cl 8, substituting cl 10(4).

'must give stakeholders a reasonable opportunity to comment on any plan' or any changes to a plan.

25 Section 38 makes provision for the contents of a timber release plan:

- (1) A plan prepared under section 37 must include—
 - (a) a schedule of coupes selected for timber harvesting and associated access road requirements;
 - (b) details of the location and approximate timing of timber harvesting in the proposed coupes;
 - (c) details of the location of any associated access roads.
- (2) A plan prepared under section 37 may include any other matters necessary or convenient to be included in the plan.

26 Section 44 of the Act requires VicForests to operate in accordance with its timber release plans:

VicForests must carry out its functions and powers under this Act in relation to vested timber resources, or in relation to an area to which an allocation order applies, in accordance with any timber release plan.

27 It is an offence to undertake timber harvesting operations in State forest unless those operations are 'authorised operations'.²³ In the case of vested timber resources, 'authorised operations' is defined to mean:²⁴

timber harvesting operations undertaken by, or on behalf of, VicForests in accordance with an allocation order and a timber release plan that relates to that allocation order;

28 In December 2019, VicForests approved and published its current timber release plan.²⁵ It includes a table listing hundreds of coupes, identified by region, forestry management area, district, and coupe address.²⁶ In respect of each coupe, there is a nominated period of harvest, and a range of other information including the gross area and the net area of the coupe, in hectares. The plan includes a glossary that

²³ Act, s 45(1).

²⁴ Act, s 45(2)(a)(i).

²⁵ First McKinnon affidavit, Exhibit SMM-37.

²⁶ The coupe address is a unique 12 digit reference number that indicates the location of an individual coupe or roadline.

includes the following definitions:

Gross Area/ Coupe Boundary - The area within which any individual harvesting or roadline coupe's operations will be conducted. It is represented spatially by the 'proposed coupe boundary' that is mapped within CENGEA Forest Planner and approved for inclusion on a Timber Release Plan.

Estimated Net - The approximate area expected to be harvested within the coupe boundary. It is the gross coupe area minus any areas likely to be excluded from harvesting due to such factors as Code of Forest Practice exclusions, Forest Management Plan requirements and retained habitat areas.

- 29 The table in the timber release plan provides 'Gross' and 'Nett' areas for six coupes in the Central Highlands forestry management area that are scheduled for harvesting in June 2020: Watering Can 301-539-0001; Point Plomer 283-503-0020; Mariner 283-503-0024; Triple Don 289-504-0010; Pilchard 284-502-0017; and Ambi Turner 345-511-0004.
- 30 More recently, VicForests has published operations plans and operations maps for those six coupes.²⁷ In each case, there is a discrepancy between the net area identified in the timber release plan and the nett area to be harvested on the current operations plans and maps.

Coupe	Timber release plan	Operations Plan/Map
Watering Can 301-539-0001	27.0 ha	30.1 ha
Point Plomer 283-503-0020	27.0 ha	32.4 ha/32.0 ha
Mariner 283-503-0024	21.0 ha	33.8 ha
Triple Don 289-504-0010	29.0 ha	39.4 ha
Pilchard 284-502-0017	13.0 ha	18.1/18.0 ha
Ambi Turner 347-513-0002	16.0 ha	23.2 ha

- 31 Kinglake FF contends that these discrepancies are evidence that, in respect of each coupe, VicForests intends to harvest a net area in excess of that stated in its timber release plan. To do so would be to harvest timber otherwise than in accordance with

²⁷ First McKinnon affidavit, Exhibits SMM-40 and SMM 41.

its timber release plan, contrary to ss 44 and 45(1) of the Act.

- 32 VicForests submits that the net areas specified for each coupe listed in the timber release plan are estimates only, consistent with the definition of 'Estimated Net' in the glossary, and are not prescriptive. It adopts the view of the Office of the Conservation Regulator, communicated to Kinglake FF on 30 April 2020 in response to a complaint:²⁸

There is no legal obligation for VicForests to publish or include in the TRP [Timber Release Plan], a net coupe area or estimated net harvest area. TRP estimates of "net harvest area" are often developed and communicated in these initial planning stages and are subject to change throughout the development of a Forest Coupe Plan.

The Code and its incorporated *Management Standards and Procedures for timber harvesting in Victoria's State forests 2014* (the MSPs) require that a Forest Coupe Plan be prepared for all timber harvesting operations and that it must include certain information, including a map that details the net planned area to be harvested and details about the areas to be excluded.

It is necessary for the planning and conduct of operations to be adaptive to new information relevant to the management of forest values and risks, particularly as determined through field assessments rather than desktop processes alone. This will mean that any previously communicated "net" areas, which are point-in-time estimates, will be subject to change closer to the time of harvest commencement or indeed, during the course of any operation.

- 33 VicForests relies on cll 2.3.1.1 and 2.3.1.2 of the Standards, which require it to prepare coupe plans and operational maps, stating the net area that is planned to be harvested. It says that it is only at this stage that VicForests does the on-the-ground mapping that enables it to move from an estimated to a definite net harvestable area. It submits that it is not required by its timber release plan to harvest in each coupe only the net area stated in the plan. Rather, it is required to harvest only the coupes specified on the plan within the time periods specified.

- 34 In my view there is a serious question to be tried that harvesting a net area greater than that specified in the timber release plan is not in accordance with the timber release plan, and is not an 'authorised operation' for the purposes of s 45 of the Act. The plan is binding on VicForests, in relation to both its mandatory content and the

²⁸ Supplementary affidavit of Natalie Laura Naylor dated 23 June 2020, [7].

other matters that VicForests has determined are necessary or convenient to include. One of those matters is the net harvestable area for each coupe in its timber release plan. The effect of specifying in the plan the net area to be harvested within each coupe is a matter for determination at trial.

35 The evidence is that there are significant discrepancies between the net areas for the six coupes in the timber release plan, and the net harvestable areas specified in the operations plans and maps. In each case, VicForests plans to harvest a greater net area of timber than is stated in its timber release plan – ranging from 3.1 hectares more in Watering Can to 12.8 hectares more in Mariner. On the current state of the evidence, this variance is unexplained.

Balance of convenience

36 VicForests submitted that there is a relationship between the strength of the serious question to be tried and the balance of convenience, so that where the *prima facie* case is weak it would require a very clear injustice to the plaintiff before an injunction would be granted.²⁹ I accept that the strength of Kinglake FF's case is an important factor in weighing the balance of convenience. In light of the interpretation of cl 5.3.1.5 of the Standards in *Leadbeater's*,³⁰ and the evidence of VicForests' planned timber harvesting operations in the relevant coupes, Kinglake FF has made out a strongly arguable case in relation to VicForests' alleged failure to screen. Its case in relation to its allegations of unauthorised timber harvesting is more finely balanced, in particular because there are arguments both ways about the effect of the timber release plan.

37 Kinglake FF submitted that the balance of convenience favoured granting both injunctions sought, because:

- (a) The destruction of native forest that the law protects from logging would be an irreversible and irreplaceable loss to the entire community. If logging is permitted to continue it will be completed by the time the proceeding is heard

²⁹ *WOTCH v VicForests (No 3)* [2020] VSC 220, [37] citing *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102, 122, 124.

³⁰ See [16] above.

and determined. The primary relief sought by Kinglake FF is a permanent injunction to restrain further logging of the 14 coupes. That relief would be rendered nugatory if an interim injunction is not granted.

- (b) Failure to screen timber harvesting operations in the ten coupes would do irreparable damage. Victoria's State forests are used and enjoyed by a wide range of community groups. The back trails are frequented by 4WD enthusiasts, trail bike riders, and hikers, who use the less travelled tracks and roads in order to experience the pleasure of travelling through our native forests. The destruction of the 20 metre buffer in the affected coupes will create eyesores throughout the Central Highlands.
- (c) Unauthorised logging not in accordance with the timber release plan also threatens other, presently unknown, environmental values. The plan was the result of a lengthy planning process, which identified areas of the six coupes that were not able to be harvested.
- (d) Based on VicForests' 2018-19 annual report and annual harvesting and regeneration report of the same year, it derived an after tax profit of \$1,953,000 from a harvested area of 2,563.1 hectares. On that basis, VicForests stands to lose, at most, \$762 net profit for each hectare that it is not able to harvest.
- (e) If VicForests succeeds in the litigation it will be able to harvest and sell the timber at a later time.
- (f) Kinglake FF has proffered the usual undertaking as to damages.

38 VicForests submitted that the balance of convenience was against granting the injunctions, even on an interim basis, because:

- (a) There was no evidence about the conservation value of the vegetation within the coupes, or in the areas that Kinglake FF says must be retained as buffers.

- (b) VicForests is already enjoined, in other proceedings, from harvesting 65 coupes in the Central Highlands area. It would cause it serious prejudice if it were to be further enjoined from harvesting in these 14 coupes.
- (c) Harvesting is in progress in most of the coupes, and has been completed in Moustache, Crusoe, Nellie, and Ambi Turner.
- (d) There was no evidence as to Kinglake FF's financial position or its ability to pay any loss that VicForests may suffer by reason of an injunction.

39 In my view, the balance of convenience favours granting both injunctions on an interim basis. I have listed Kinglake FF's summons for further hearing on 14 July 2020, by which time VicForests will have had an opportunity to respond to the evidence relied on by Kinglake FF, in particular on matters relevant to the balance of convenience.

40 As I have explained, I am satisfied that there is a serious question to be tried that VicForests is failing or will fail to screen its timber operations in ten coupes, contrary to cl 5.3.1.5 of the Standards, and that it plans to harvest timber not in accordance with its timber release plan. There is a strongly arguable case in relation to the alleged failure to screen, and there is an arguable case in relation to the alleged unauthorised harvesting.

41 I am also satisfied that logging is in progress, or is imminent, in most of the coupes. Unless restrained, the evidence is that VicForests will continue to log in those coupes, harvesting the net area specified in its operations plans and maps, and without retaining a 20 metre buffer from all roads and tracks. While VicForests' General Counsel was informed that logging had been completed in four coupes, that information was obtained under very considerable time pressure, and I am not confident that it was either complete or certain.

42 On that basis, an interim injunction would preserve the subject matter of the proceeding – namely, Kinglake FF's claim for a permanent injunction to restrain

VicForests from timber harvesting that is not authorised by the Act. If logging continues, the timber will be harvested by the time the proceeding is heard and determined, and the harm that Kinglake FF seeks to prevent will be done. Kinglake FF does not seek damages in its writ, and there is no question of damages being an adequate remedy in this case.

43 It appears from its location within the Standards that the requirement in cl 5.3.1.5 to screen timber harvesting operations from view exists to protect landscape values within the Central Highlands forestry management area. It is not primarily concerned with biodiversity or protecting vegetation of particular conservation value. At present there is no evidence of the actual use of the roads and tracks within and adjoining the ten coupes, other than Ms McKinnon's evidence of driving and walking on the roads in the Watering Can coupe. There is, however, general evidence of the activities of Kinglake FF and its members in State forest in Kinglake and the Central Highlands area, including spotlighting nights, flora and fauna surveys, forest tours, and a forest recovery picnic. In addition, the roads and tracks in question are on unreserved Crown land, and are available for use by all members of the public – who may well include walkers, trail bike riders, and four wheel drivers. If the 20 metre buffer is not retained, the landscape along those roads and tracks will be adversely affected for many years.

44 In relation to the alleged unauthorised logging, I give weight to the balance between competing interests that is struck by the Act. There is a public interest in the law being observed so that this balance is maintained. The Act obliges VicForests to conduct its operations in accordance with its own timber release plan. There is an arguable case here that it intends to do otherwise.

45 I have put to one side VicForests' submission that an injunction in this case might be 'the straw that breaks the camel's back', given that it is enjoined from logging in 65 other coupes in the Central Highlands area. Those injunctions were granted because, in each case, a judge was satisfied that there was a serious question that VicForests was logging or intended to log those coupes contrary to law, and that the balance of

convenience favoured an injunction.³¹ It was really not clear how those injunctions were said to bear on the balance of convenience in this case.

46 I accept that VicForests did not have time in which to provide evidence of any more specific harm that it might suffer if the injunctions sought were granted. At a minimum, the injunctions are likely to disrupt its planned timber harvesting operations. On the other hand, the timber will be able to be harvested at a later date if VicForests is ultimately successful in the proceeding.

47 I consider that the financial and other consequences of the disruption that will result from the injunctions can be minimised by framing them so that they permit authorised logging to continue. I accepted submissions made on behalf of VicForests as to how this could be done, in particular the suggestion that that VicForests could prepare revised operations maps for the Mariner, Watering Can, Point Plomer, Triple Don, Pilchard, and Ambi Turner coupes that have a net harvestable area that accords with its timber release plan.

48 On the evidence as it stands, the financial impact on VicForests of the injunctions is likely to be modest. Kinglake FF proffered the usual undertaking as to damages. For the reasons articulated by Forrest J in *Environment East Gippsland Inc. v VicForests (No. 2)*,³² I regard that undertaking as sufficient for the purposes of the interim injunctions granted.

49 Overall, it is my judgment that granting the interim injunctions sought, on terms that permit VicForests to continue logging in areas of the coupes that Kinglake FF accepts it is authorised to harvest, carries the least risk of injustice between the parties.

Disposition

50 For those reasons, I made orders granting interim injunctions in the following terms:

³¹ *WOTCH v VicForests (No 3)* [2020] VSC 220; *Warburton Environment Inc. v VicForests* [2020] VSC 337.

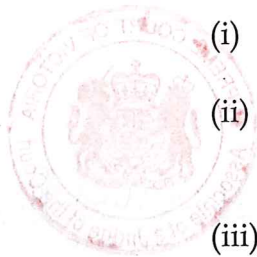
³² [2009] VSC 421, [19]-[21], [29]-[33].

1. Subject to Order 2, until 5:00 PM on 14 July 2020, the defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise, fell or cut trees or parts of trees:
 - (a) in Coupe 283-503-0024 ("Mariner");
 - (b) in Coupe 301-539-0001 ("Watering Can");
 - (c) in Coupe 283-503-0020 ("Point Plomer");
 - (d) in Coupe 289-504-0010 ("Triple Don");
 - (e) in Coupe 284-502-0017 ("Pilchard"); and
 - (f) in Coupe 345-511-0004 ("Ambi Turner").

This order does not prohibit the defendant from felling or cutting trees or parts of trees in order to address a serious risk to human safety.

2. The defendant may by 30 June 2020, file and serve an updated operations map for any coupe listed in Order 1, identifying in respect of that coupe a net harvestable area that accords with the defendant's Timber Release Plan dated 19 December 2019. In that event, from the time the updated operations map is filed with the Court, Order 1 does not prohibit the defendant from felling or cutting trees within the net harvestable area shown on the updated operations map.
3. Until 5:00pm on 14 July 2020, the defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise, fell or cut trees or parts of trees:
 - (a) in Coupe 320-503-0024 ("Moustache"), within 20 metres of Frenchmans Spur Track;
 - (b) in Coupe 284-502-0008 ("Crusoe"), within 20 metres of Black Range Road;

- (c) in Coupe 301-537-0006 ("Port"), within 20 metres of:
- (i) Watering Link Road (being the road that runs through the coupe, between Plantation Road and the road known as Cottrell Road or Mount Disappointment Forest Drive);
 - (ii) Plantation Road; and
 - (iii) Morrisons Creek Road;
- (d) Coupe 283-505-0003 ("Carbonara"), within 20 metres of:
- (i) Keltys Road; and
 - (ii) Falls Creek Road;
- (e) in Coupe 282-512-0007 ("Charmander"), within 20 metres of:
- (i) Pound Break Road;
 - (ii) Chute Road; and
 - (iii) Cameron Road;
- (f) in Coupe 297-518-0001 ("Nellie"), within 20 metres of:
- (i) Marginal Road; and
 - (ii) the two unnamed roads linking Marginal Road with Wee Creek Track; and
 - (iii) Wee Creek Track;
- (g) in Coupe 301-520-0002 ("Neils Flower"), within 20 metres of:
- (i) Flowerdale Road; and
 - (ii) Neills Road;
- (h) in Coupe 283-503-0024 ("Mariner"), within 20 metres of:
- (i) Waterwheel Track; and
 - (ii) Garlick Track;



- (i) in Coupe 301-539-0001 ("Watering Can"), within 20 metres of:
 - (i) Main Mountain Road;
 - (ii) Watering Creek Road;
 - (iii) Westcott Creek Road; and
- (j) in Coupe 313-503-0002 ("Barcelona"), within 20 metres of Big River Road.

This order does not prohibit the defendant from felling or cutting trees or parts of trees necessary to create road access to the interior of a coupe, as shown on the defendant's published operations map for that coupe, or in order to address a serious risk to human safety.

CERTIFICATE

I certify that this and the 18 preceding pages are a true copy of the reasons for ruling of Justice Richards of the Supreme Court of Victoria delivered on 26 June 2020.

DATED this twenty-sixth day of June 2020.


Maxine Baber
Associate