
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

MELBOURNE

WEDNESDAY 11 AUGUST 2010

(17th day of hearing)

BEFORE THE HONOURABLE JUSTICE OSBORN

B E T W E E N

ENVIRONMENT EAST GIPPSLAND

Plaintiff

- and -

VICFORESTS

Defendant

MS D. MORTIMER SC with MR R.M. NIALL and MS P.C. KNOWLES
appeared on behalf of the Plaintiff.

MR I.G. WALLER SC with MR H.L. REDD appeared on behalf of the
Defendant.

1 HIS HONOUR: I should first record that this hearing is being
2 transmitted via video link to Bairnsdale.

3 The plaintiff is a conservation group which seeks an
4 order restraining further timber harvesting in the valley
5 of Brown Mountain Creek, East Gippsland. The four logging
6 coupes in issue contain old growth forest, which is both
7 ecologically significant and of significant value as a
8 potential timber resource.

9 VicForests has approvals to harvest these coupes
10 under a complex legislative scheme which seeks to balance
11 conservation objectives on the one hand, against
12 sustainable economic objectives on the other. That scheme
13 is complemented by very substantial conservation reserves
14 in East Gippsland, including reserves surrounding the
15 valley of Brown Mountain Creek, which was significantly
16 expanded in 2009 by the current State Government.

17 I accept that the approval of the Brown Mountain
18 coupes for logging has occurred as the outcome of a
19 considered forestry planning process, which addresses the
20 characteristics of the coupes in question within a
21 framework of management zones and prescriptions, which
22 seek to minimise impact upon biodiversity values.

23 **Nevertheless, I have come to the conclusion that**
24 **during its operations, VicForests remains obliged to**
25 **respond to the detection of endangered species of fauna**
26 **and to take a precautionary approach with respect to their**
27 **potential extinction.**

28 I have further concluded that the detection of Long-
29 footed Potoroos within the Brown Mountain coupes has
30 triggered a requirement to create a habitat retention area
31 under the relevant Flora and Fauna Guarantee Act action

1 statement.

2 I have also concluded that the detection of very
3 **exceptionally high levels of Greater Gliders and Yellow-**
4 **bellied Gliders within the coupes has triggered a**
5 **requirement for the creation of a special protection zone,**
6 in accordance with standards contained in the East
7 Gippsland Forest Management Plan and incorporated in the
8 approvals given to VicForests to log the relevant coupes.

9 I have further concluded that the application of the
10 **precautionary principle requires the undertaking of**
11 **further surveys at appropriate times for two species of**
12 **endangered frog, the Giant Burrowing Frog and the Large**
13 **Brown Tree Frog and also for the Spot-tailed Quoll.**

14 Lastly, I have concluded that the precautionary
15 principle requires the completion of a review currently
16 underway, with respect to the provision of Powerful Owl
17 management areas and Sooty Owl management areas in East
18 Gippsland. In the event of the detection of Spot-tailed
19 Quolls at Brown Mountain, the current review of the system
20 of reserves for the Spot-tailed Quoll should also be
21 completed before timber harvesting proceeds.

22 The principle governing the review of Powerful Owl
23 management areas and Sooty Owl management areas and
24 reserves for the Spot-tailed Quoll is that reserves based
25 on actual detection of the species should be substituted
26 for reserves currently based on hypothetical modelling
27 only.

28 In order to give effect to these conclusions,
29 **VicForests should be restrained by injunction from**
30 **harvesting until the relevant steps have been completed,**
31 to the satisfaction of the Director, Biodiversity Policy

1 and Programs of the Department of Sustainability and
2 Environment.

3 The court will publish its full reasons and then I
4 will say something further.

5 If counsel go to p.228 at paragraph 761, I have set
6 out in summary terms the substance of the injunctions I
7 propose to grant and I will read that paragraph.

8 "In my view, VicForests should be restrained from
9 logging the Brown Mountain coupes until:

10 (a) A special management zone at Long-footed Potoroo
11 retained habitat area has been created in respect of
12 detection of the Long-footed Potoroo within Coupes 15, 19
13 and 26 and in accordance with Appendix 1 to the Flora and
14 Fauna Guarantee Act's action statement, to the
15 satisfaction of the Director, Biodiversity Policy and
16 Programs DSE.

17 (b) A survey is carried out for the presence of the
18 Giant Burrowing Frog and the Large Brown Tree Frog within
19 Coupes 15, 19, 26 and 27 during appropriate climatic
20 conditions, by appropriately qualified persons to the
21 satisfaction of the Director.

22 (c) A review of the provision of Powerful Owl
23 management areas and Sooty Owl management areas within the
24 East Gippsland Forest Management Area, taking into account
25 the report of Dr Bilney dated December 2009, is completed
26 to the satisfaction of the Director, DA Survey is carried
27 out for the presence of the Spot-tailed Quoll within
28 Coupes 15, 19, 26 and 27 during the breeding season of the
29 Spot-tailed Quoll in and between May and August by
30 appropriately qualified persons to the satisfaction of the
31 Director and in the event of detection of the Spot-tailed

1 Quoll, a review of the provision of reserves for the Spot-
2 tailed Quoll within the East Gippsland Forest Management
3 Area is completed to the satisfaction of the Director.

4 (e) A special protection zone of approximately 100
5 hectares is created to the satisfaction of the Director in
6 respect of the detection of densities of Greater Gliders
7 and Yellow-bellied Gliders in Coupe 15, exceeding those
8 specified in the guideline relating to arboreal mammals
9 contained in the East Gippsland Forest Management Plan."

10 If you the go to paragraph 771, you will see that I
11 have also concluded that those injunctions should be
12 conditioned upon undertakings (a), that the plaintiff
13 provide to DSE copies of all photographic evidence it
14 possesses, relating to the presence of the Long-footed
15 Potoroo in the Brown Mountain coupes and (b), that the
16 plaintiff take all reasonable steps to assist DSE to
17 confirm the precise location of the taking of the images
18 produced in evidence by Ms McLaren.

19 Despite the diligence that counsel have demonstrated
20 in this matter, I don't expect you to digest 232 pages at
21 the Bar table and what I propose is that you should have
22 the opportunity to exchange minutes of orders that give
23 effect to those conclusions, because it is important that
24 they be expressed with precision and in a way that each
25 side has had a chance to consider. In other words, I
26 **wouldn't make orders of such significance on the spot; I**
27 **think the proper course is to give both of you a chance to**
28 **formulate the orders for you to confirm that you can give**
29 **the undertakings on behalf of your client, Ms Mortimer.**

30 MS MORTIMER: Yes, Your Honour.

31 HIS HONOUR: Then we will come back and make orders. There may

1 also be some debate about costs. If you were all agreed,
2 then I could endeavour to wrap matters up this Friday
3 afternoon but if either side wanted longer than that, then
4 I would put the final determination matter off to a date
5 to be fixed.

6 I have a civil circuit starting at Geelong next
7 Monday. My estimate would be that if it goes off, it
8 would probably have to go off for two weeks or thereabouts
9 but it won't go off for more than a month, if I can put it
10 that way. It is a question really of you sorting out
11 between yourselves when you would like to come back. If
12 you really want to wrap it up then we can come back this
13 Friday and I am prepared to sit late if necessary to sort
14 it all out for you but on the other hand, if you want a
15 little longer to think about it all, that is if either
16 side wants a little longer, then I will give you a little
17 longer.

18 MS MORTIMER: Your Honour, perhaps it would be convenient if my
19 learned friend and I conferred about that, in fact we
20 could communicate with Your Honour's Associate about
21 whether we think we can be in a position to address those
22 issues by Friday.

23 HIS HONOUR: Yes.

24 MS MORTIMER: If Your Honour pleases. **Your Honour, there is**
25 **also then the issue about the existing injunction.**

26 HIS HONOUR: **Yes, that will be continued until I pronounce**
27 **final relief in the matter, on the same terms.**

28 MS MORTIMER: Thank you, Your Honour.

29 HIS HONOUR: Mr Waller, that seems a practical way forward.

30 MR WALLER: Yes, it is. I fully agree with what my learned
31 friend has suggested and hopefully we can inform Your

1 Honour's Associate tomorrow, hopefully tomorrow morning,
2 about whether we can manage to do it on Friday or perhaps
3 we need to go to another date.

4 HIS HONOUR: Yes, well for the moment I will simply adjourn
5 sine die. I will specifically reserve liberty to apply;
6 if there was some reason that one side wanted to bring it
7 on without the agreement of the other side, then obviously
8 I would endeavour to accommodate you expeditiously.

9 MS MORTIMER: If Your Honour pleases.

10 MR WALLER: If Your Honour pleases.

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