
Case note

THE PRECAUTIONARY PRINCIPLE WITH REFERENCE TO MYENVIRONMENT INC V VICFORESTS [2012] VSC 91

Prior to taking any action that may impact the environment, the application of the precautionary principle requires decision-makers to consider whether there is a threat of serious or irreversible damage to the environment and, if so, whether there is material scientific uncertainty as to the nature and scope of the threat of environmental damage. This article considers the recent decision of Osborn J in *MyEnvironment Inc v VicForests* [2012] VSC 91 (*Toolangi Case*), which provides a useful case study on the application of the precautionary principle with reference to leading cases in New South Wales and Victoria. In the *Toolangi Case*, MyEnvironment's application for a permanent injunction against VicForests on the basis of the precautionary principle was unsuccessful because MyEnvironment failed to establish that "a threat of serious or irreversible damage to the environment will result" from the proposed variable retention harvesting by VicForests.¹ In addition, the adaptive management measure put forward by MyEnvironment was "not directly responsive to, or proportionate to, any threat which may be hypothesised to result from the variable retention harvesting".² The precautionary principle is one of any number of factors a decision-maker must consider and while its application will require a decision-maker to be cautious, it will not necessarily mean the proposed action must be abandoned.

INTRODUCTION TO THE PRECAUTIONARY PRINCIPLE

The precautionary principle is enshrined in environmental statutes such as the *Environment Protection Act 1970* (Vic), s 1C, which states that "if there are 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".³ The precautionary principle therefore allows for preventative measures to be taken without having to wait until the seriousness of the threat is fully known.⁴

Leading cases establish that the application of the precautionary principle requires decision-makers to consider the following factors prior to taking any action that may impact the environment:

1. Will the proposed action constitute a threat of serious or irreversible damage to the environment?
2. If so, is there material scientific uncertainty as to the nature and scope of the threat of environmental damage?⁵
3. If the above two criteria are met, the precautionary principle is engaged and the decision-maker needs to satisfy the court that the threat of serious or irreversible damage to the environment is negligible in order to proceed with the proposed action.
4. If this is not shown, the burden is on the applicant (ie the person opposing the action) to establish that the relief sought is proportionate to the threat alleged.⁶

The requirements of the precautionary principle must be considered by reference to the facts as they are at the time of the hearing, not at the time the alleged "threatening" action is planned.⁷

¹ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [22].

² *MyEnvironment Inc v VicForests* [2012] VSC 91 at [23].

³ See also the *Protection of the Environment Administration Act 1991* (NSW).

⁴ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [156]; *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [201].

⁵ *Leach v National Parks and Wildlife Services* (1993) 81 LGERA 270 at [282], cited in *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [140].

⁶ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [310]-[312]; *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [128], [150]-[155]; *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [188], [99], [212].

⁷ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [269].

The *Toolangi Case* illustrates how the precautionary principle is practically applied where a party is seeking to permanently halt proposed logging. It also provides a useful summary of the relatively limited case law in this area.

THE FACTS

The concern over environmental damage in this case involved the habitat of the leadbeater's possum, which is endangered under the *Flora and Fauna Guarantee Act 1988* (Vic) and the (now repealed) *Endangered Species Protection Act 1992* (Cth).⁸ The leadbeater's possum is a small native animal thought to be extinct in the 1960s but was subsequently rediscovered in areas around Marysville. Since then, the possum's survival has depended upon the availability of suitable habitat, which includes large living and dead hollow bearing trees and a dense understorey of acacia trees found in wet mountain ash forests.

The availability of this habitat is affected most significantly by bushfires and timber harvesting. The Black Saturday bushfires in 2009 destroyed much of the ash forest, which comprised the leadbeater's possum habitat in the central highlands. The fires also destroyed areas planned for timber harvesting, so the value of the remaining ash forest for both potential possum habitat and as a timber resource increased as a result.

THE ARGUMENTS

VicForests was proposing to log an area called the "Toolangi Coupes". MyEnvironment claimed the logging proposed was unlawful because it would breach the precautionary principle in that it was not ecologically sustainable.

VicForests argued, first, that the precautionary principle did not give rise to an enforceable legal obligation with respect to timber harvesting in the Toolangi Coupes. Further, VicForests argued that – while there was no real threat of serious or irreversible danger to the environment – even if the precautionary principle was engaged, the proposed timber harvesting would be undertaken in accordance with the proper application of the principle. VicForests also argued that the adaptive management measures put forward by MyEnvironment were not proportionate to any threat of danger to the environment.

THE PRECAUTIONARY PRINCIPLE DOES GIVE RISE TO AN ENFORCEABLE LEGAL OBLIGATION

Osborn J did not agree with the first point put forward by VicForests; namely, that the precautionary principle did not give rise to an enforceable legal obligation.

Section 46(a) of the *Sustainable Forests (Timber) Act 2004* (Vic) states that VicForests must comply with any relevant code of practice relating to timber harvesting. The Code of Practice was released by the Victorian Department of Sustainability and Environment in 2007. Osborn J found that cl 2.2.2 of the Code required the application of the precautionary principle:

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.⁹

The precautionary principle is defined in the Code of Practice as follows:

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

⁸ Although this Act has been repealed, the species contained in the Schedule to the Act continue to be protected under s 178 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁹ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [263]-[264].

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.

SERIOUS OR IRREVERSIBLE THREAT

In order to determine whether the logging constituted a serious and irreversible threat to the environment, Osborn J applied the test put forward by Preston CJ in *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10, where he outlined a number of factors to consider:

- a) the spatial scale of the threat (for example, local, regional, statewide, national, international);
- b) the magnitude of possible impacts, on both natural and human systems;
- c) the perceived value of the threatened environment;
- d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;
- e) the complexity and connectivity of the possible impacts;
- f) the manageability of possible impacts, having regard to the availability of means and the acceptability of means;
- g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and
- h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.¹⁰

In applying this test, Osborn J gave two examples of where a serious or irreversible threat would exist. Both examples were accompanied by substantial uncertainty as to the survival of the threatened species. His Honour noted:

[I]t will be easier to identify a threatened breach of the precautionary principle when a specific action threatens direct serious or irreversible damage to an aspect of the environment of extreme sensitivity and/or novel qualities. The more generalised the threat and the more indirect and less immediate the damage to a sensitive aspect of the environment, the more difficult it will be to be satisfied that the precautionary principle requires abstinence from a particular action.¹¹

Almost half of the potentially suitable habitat for leadbeater's possum was severely burnt and damaged in the 2009 bushfires. Expert evidence was led that unless steps were taken to prevent the loss of unburnt forest areas, particularly those areas with hollow bearing trees, there was a high risk that the leadbeater's possum would become extinct within the next two to three decades.

However, a combination of factors led to the decision that the proposed logging of Gun Barrel¹² constituted no threat of serious or irreversible damage to the leadbeater's possum and/or its habitat. First, VicForests had committed to mark and retain any pre-1900 trees within the area to be logged. Secondly, VicForests had also committed to harvest the area in accordance with variable retention harvesting, which meant the area would not be subjected to clear felling and, instead, a portion of the forest structure would be retained. Osborn J found that variable retention harvesting would not destroy essential habitat of the leadbeater's possum: there was no direct evidence that leadbeater's possums had been detected in Gun Barrel and no evidence identifying probable actual habitat trees within Gun Barrel. Thirdly, there was no Zone 1A or Zone 1B within the area to be logged (being zones that prioritised the protection of leadbeater's possum habitat). Fourthly, the area to be logged was relatively small compared to the total area that had been preserved as leadbeater's possum habitat: of the 181,000 ha of ash eucalypt forest in the Central Highlands, 85,000 ha are in conservation reserves or the special protection zones where timber harvesting is prohibited. By contrast, VicForests was proposing to log 13.7 ha at Gun Barrel. Fifthly, the logging of Gun Barrel would be consistent with both the Leadbeater's Possum Action Statement made under the *Flora and Fauna Guarantee Act* and

¹⁰ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [131]; also applied in *MyEnvironment Inc v VicForests* [2012] VSC 91 at [274]; *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [190].

¹¹ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [268].

¹² While the Toolangi Coupes included three areas selected by VicForests for possible logging, there were only substantial plans for the area called the Gun Barrel, so the potential threat was only considered by Osborn J in relation to the Gun Barrel.

the Forest Management Plan, which make it clear that reserve or exclusion areas are implemented after consideration of ecologically sustainable development and potential environmental consequences as well as social and economic considerations.

Therefore, the precautionary principle was not engaged in this case because the proposed logging of Gun Barrel did not constitute a threat of serious or irreversible damage to the leadbeater's possum and/or its habitat.

MATERIAL SCIENTIFIC UNCERTAINTY

Scientific certainty about environmental threats of damage is rarely achievable, so the difficulty with this criterion is the degree of uncertainty that is required to engage the precautionary principle.

This issue was considered in more detail in *Telstra*, when Preston CJ again provided a number of factors to consider when assessing the degree of uncertainty:

- a) the sufficiency of the evidence that there might be serious or irreversible environmental harm caused by the development plan, programme or project;
- b) the level of uncertainty, including the kind of uncertainty (such as technical, methodological or epistemological uncertainty); and
- c) the potential to reduce uncertainty having regard to what is possible in principle, economically and within a reasonable time frame.¹³

Where there is a threat of environmental damage and that threat is relatively certain, measures will need to be taken to prevent, control or regulate the threat of damage. In contrast, under the precautionary principle, the nature or scope of environmental damage is less certain and, therefore, precautionary measures are appropriate.¹⁴ Such measures require decision-makers to be cautious,¹⁵ by conducting research (or referring to available research) and considering the risks from a pessimistic perspective before making a decision.¹⁶

Although this criterion was not discussed in great detail in the *Toolangi Case*, it might have been satisfied by the uncertainty surrounding the overall extent of the possum habitat following the 2009 fires and the capacity for the leadbeater's possum to survive the expected "bottleneck" reduction in optimum habitat over the next 50 years.¹⁷

As stated by Preston CJ, when there is scientific uncertainty, "the benefit of the doubt is given to environmental protection... To avoid environmental harm, it is better to err on the side of caution".¹⁸

NEGLIGIBLE THREAT

If the precautionary principle is activated upon examination of the above factors, a decision-maker must "assume that there is, or will be, a serious or irreversible threat of environmental damage".¹⁹ This will shift the burden of proof to the decision-maker, who must show that the threat is either non-existent or negligible in order to avoid the application of the precautionary principle.

This may involve the decision-maker presenting evidence of the likely consequences of the proposal, a proposed management regime and evidence to assist the court in assessing the

¹³ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [141].

¹⁴ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [149].

¹⁵ *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 at [282], cited in *MyEnvironment Inc v VicForests* [2012] VSC 91 at [261] and *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [185].

¹⁶ *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102 at 118, cited in *MyEnvironment Inc v VicForests* [2012] VSC 91 at [262] and *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [186].

¹⁷ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [311].

¹⁸ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [151].

¹⁹ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [152].

risk-weighted consequences of the proposal.²⁰ The difficulty here is the lack of guidance on “when a risk should be considered to be so negligible that it may safely be disregarded”.²¹

If the decision-maker cannot or does not present evidence of a negligible threat, this does not mean the proposed plan should fail, nor does it mean the assumed threat must be given more weight than social or economic factors when making a decision.²²

RELIEF MUST BE PROPORTIONATE TO THE THREAT

Once the threat of serious or irreversible environmental damage and scientific uncertainty of this have been shown, the application of the precautionary principle means that a precautionary measure may be taken to avert the threat of damage. However, measures should be proportionate and “should not go beyond what is appropriate and necessary in order to achieve the objective in question”.²³

In the *Toolangi Case*, MyEnvironment sought to restrain logging until VicForests took adequate adaptive measures to protect the environment, namely:

- a) conduct surveys of the unsurveyed parts of the Toolangi Coupes by qualified experts;
- b) review the Leadbeater’s Possum Action Statement;
- c) review the reserve system for the leadbeater’s possum following the 2009 bushfires; and
- d) develop an appropriate methodology for detecting Zone 1A habitat (which prioritises conservation of the leadbeater’s possum and its habitat).

Osborn J did not accept that these measures were proportionate to any hypothesised risk. In relation to (a), it was found that the Gun Barrel area had already been adequately surveyed while the other two areas were still being assessed. In relation to (b), a review was already under way but Osborn J was not convinced that any review of the Leadbeater’s Possum Action Statement would relevantly alter the zoning system. While research had been proposed for reviewing the reserve system for the leadbeater’s possum, as sought by MyEnvironment under (c), the final technical report was not due until June 2013. Osborn J found the proposed research did not support the case for restraining all timber harvesting until the research was complete. Finally, in relation to (d), although there was a draft survey methodology being developed, Osborn J found it was not appropriate to restrain logging pending the resolution of the survey methodology, and the document would not be resolutely legally binding on VicForests.

CONCLUSION

As discussed above, it must be remembered that the precautionary principle is one of any number of factors the decision-maker must consider, and it does not necessarily have to be the decisive factor.²⁴ In addition, the course of action to be taken following the weighing of risks will be a question of fact, but the application of the precautionary principle will not require the avoidance of all risks.²⁵ Its

²⁰ *Conservation Council of SA Inc v Development Assessment Commission* [1999] SAERDC 86.

²¹ *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102 at 118, cited in *MyEnvironment Inc v VicForests* [2012] VSC 91 at [262] and *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [186].

²² *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [154]; *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143 at [154].

²³ *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [207]; *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [166].

²⁴ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [154]; *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143 at [154].

²⁵ *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [157]-[160]; *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [203]; *MyEnvironment Inc v VicForests* [2012] VSC 91 at [314].

application will dictate caution, but it does not necessarily mean no action should be taken, nor will it generally require one specific course of action to be favoured to the exclusion of others.²⁶

MyEnvironment has reportedly lodged an appeal against the decision of Osborn J in the Victorian Court of Appeal. At the time of writing, the date for hearing is yet to be set.

Peter George
Partner, Minter Ellison Lawyers Planning and Environment Practice Group
Anna Martin
Lawyer, Minter Ellison Lawyers Planning and Environment Practice Group

²⁶ *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102 at 118, cited in *MyEnvironment Inc v VicForests* [2012] VSC 91 at [262] and *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at [186].