

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

Not Restricted

S ECI 2020 02461

WARBURTON ENVIRONMENT INC (ABN 28 781 873 830)

Plaintiff

v

VICFORESTS

Defendant

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JUDGE: GARDE J  
WHERE HELD: Melbourne  
DATE OF HEARING: 15 July 2021  
DATE OF JUDGMENT: 21 July 2021  
CASE MAY BE CITED AS: Warburton Environment Inc v VicForests (No 4)  
MEDIUM NEUTRAL CITATION: [2021] VSC 433

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PRACTICE AND PROCEDURE – Timber harvesting of State forests – Statement of issues – Procedure to be adopted – Principles to be applied – *Civil Procedure Act 2010* (Vic) ss 50, 50A.

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| <u>APPEARANCES:</u> | <u>Counsel</u>                     | <u>Solicitors</u>         |
|---------------------|------------------------------------|---------------------------|
| For the Plaintiff   | Mr J Korman                        | Oakwood Legal             |
| For the Defendant   | Mr E Nekvapil with<br>Ms M Narayan | Johnson Winter & Slattery |

HIS HONOUR:

### **Introduction**

- 1 In this proceeding, the plaintiff ('Warburton') seeks to restrain the defendant ('VicForests') from undertaking certain timber harvesting operations in the Central Highlands of Victoria. Warburton alleges that unless restrained, VicForests will breach the Code of Practice for Timber Production 2014 ('Code') and the Management Standards and Procedures for timber harvesting operations in Victoria's State Forests 2014 ('Standards').
- 2 The proceeding has seen numerous interlocutory contests and appeals.<sup>1</sup>
- 3 The proceeding is listed for trial on 21 February 2022, and the parties are about to undertake discovery. They have requested that the Court settle a statement of issues under s 50(2) of the *Civil Procedure Act 2010* (Vic) ('Act').

### **Relevant provisions**

- 4 Sections 50 and 50A of the Act provide:

#### **50 Statement of issues**

- (1) Without limiting any other power of a court under this Part, a court may order or direct that parties to a proceeding consult and prepare a statement of issues which identifies and summarises the key issues in dispute in the proceeding.
- (2) The court may settle the contents of the statement of issues ordered or directed to be prepared under subsection (1) if the parties are unable to agree on the contents of the statement.

#### **50A Use of statement of issues**

- (1) The court may use a statement of issues in a proceeding in any manner

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<sup>1</sup> *Warburton Environment Inc v VicForests* [2020] VSC 337 (Macaulay J); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 6 August 2020); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 7 August 2020); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 23 September 2020); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 6 October 2020); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 16 October 2020); *Warburton Environment Inc v VicForests (No 2)* [2020] VSC 738 (Garde J); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 23 November 2020); *Warburton Environment Inc v VicForests (No 3)* [2021] VSC 35 (Garde J); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 31 March 2021); *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 21 June 2021); *Warburton Environment Inc v VicForests* [2021] VSCA 194 (Niall, Emerton and Kennedy JJA).

the court considers appropriate to further the overarching purpose in relation to the following—

- (a) pre-trial procedures;
  - (b) the conduct of the proceeding at trial.
- (2) Without limiting subsection (1), a statement of issues may be used for the purpose of discovery of documents.
  - (3) A statement of issues does not displace the function of any pleadings in the proceeding.

5 Sections 50 and 50A were introduced into the Act by the *Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014* (Vic).

6 In the second reading speech, the Attorney General stated:

The bill allows the court to order that parties consult to prepare a statement of the key issues in dispute in the proceeding, which can then be used for pretrial processes such as discovery or for the conduct of the proceeding at trial. While pleadings are generally the main mechanism through which the issues in dispute are defined, concerns have been raised that pleadings can sometimes be overly lengthy and complex and that they can fail to properly identify and confine the limits of a dispute. Although a statement of issues will not displace the function of pleadings in a proceeding, the bill allows the court to use a statement of issues as an alternative mechanism to narrow the focus of both pretrial and trial processes to the real issues in dispute. This flexibility will ensure that the courts can use different mechanisms depending on the circumstances of the case to define the issues from the outset of the proceeding, and therefore to limit the scope of discovery that is required.<sup>2</sup>

7 The explanatory memorandum included:

New section 50 enables a court to order or direct that the parties consult and prepare a statement of issues that identifies and summarises the key issues in dispute in the proceeding. If the parties cannot agree on the contents of the statement, it may be settled by the court.

New section 50A provides that a statement of issues may be used in a proceeding in any manner considered appropriate by the court to further the overarching purpose. The overarching purpose, as set out in section 7 of the [Act], is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. The statement of issues provided for by new section 50 may be used in relation to both pre-trial procedures (including for the purpose of discovery of documents) and for the conduct of the proceeding at trial. Subsection (3) provides that a statement of issues does not displace the function of any pleadings in the proceeding, which will continue to define the issues for judicial determination. However, this does not prevent a court from dispensing

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<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 February 2013, 227-8 (Robert Clark, Attorney-General).

with pleadings in a specific case pursuant to other powers in the [Act] or pursuant to the rules of court.<sup>3</sup>

8 While it has been said that the statement of issues procedure is flexible and enables the Court to properly define the issues from the start,<sup>4</sup> there has been little discussion as to the principles to be applied when a statement of issues is settled.<sup>5</sup>

### **Pleadings**

9 In the present case, pleadings are extensive and detailed. There have been numerous versions of the statement of claim. The current version extends to 51 pages, while the defence amounts to 14 pages consisting largely of admissions and denials. A statement of issues may assist the parties and the Court to identify and define the key issues.

### **Proposed statement of issues**

10 Warburton and VicForests propound competing statements of issues. While there are differences in drafting, there are also significant similarities in the issues that have been identified. Both parties:

- (a) identify standing as the first issue;
- (b) address the consequences of the applicable regulatory prescriptions as the central issue;
- (c) raise the issue as to whether VicForests is required to change its current practices for the protection of Tree Geebungs; and
- (d) provide definitions of the terms used in their respective statements of issues.

11 The main differences in the draft statements provided by the parties relate to:

- (a) whether certain expressions defined in the statement of claim should be included in the statement of issues;

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<sup>3</sup> Explanatory Memorandum, *Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Bill 2014* (Vic), 2.

<sup>4</sup> J K Arthur, LexisNexis, *Civil Procedure: Victoria*, (online at 14 July 2021) [C4.50.0].

<sup>5</sup> For examples of cases where statements of issues have been used or referred to see *Construction Engineering (Aust) Pty Ltd v Adams Consulting Engineering Pty Ltd (Ruling No 2)* [2016] VSC 209 (Vickery J); *Lopes v Taranto* [2018] VSCA 288 (Kyrou, McLeish and Hargrave JJA).

- (b) the extent to which the statement of issues should descend into subordinate issues and evidence;
- (c) whether the issues should include the adequacy of VicForests' special management plan for Tree Geebungs; and
- (d) whether the issues should include the relief sought.

12 These differences will be dealt with in turn.

**Use of certain expressions defined in the statement of claim**

13 In my view, the statement of issues is better structured by reference to the applicable regulatory instruments recognised under law than by reference to expressions configured by parties in their pleading. The provisions of regulatory instruments are certain and objectively discernible whereas expressions like the 'Tree Geebung Management Prescription' and the 'Tree Geebung Mandatory Action' conceived by Warburton in the current version of the statement of claim are artificial and may introduce doubt as to what is included or intended.

**Subordinate issues and evidence**

14 Warburton's draft refers to the need to determine the current state of scientific opinion to protect Tree Geebungs and apply the precautionary principle, and the need to determine whether VicForests' practices adopt certain specified actions. VicForests' draft does not refer to the need to determine the current state of scientific opinion concerning Tree Geebungs or to the actions Warburton says are required. It is not dependent on expert evidence to be given at the trial.

15 The experts to be called at the trial may include ecologists, botanists, environmental scientists, foresters and economists. The parties are yet to file expert reports. No joint expert conference has been conducted and no joint expert report is available. At this stage, it is inappropriate to descend into possible subordinate issues such as the current state of scientific opinion or the consequences of the application of the precautionary principle. Likewise, it is not desirable to formulate issues based on evidence yet to be prepared or given.

### **Adequacy of VicForests' special management plan for Tree Geebungs**

- 16 VicForests has documented and adopted a special management plan for Tree Geebungs. The question arises as to whether the measures outlined in this plan are sufficient to satisfy the applicable regulatory requirements and standards. This issue should be included.

### **Relief sought**

- 17 Another important question relates to the relief sought by Warburton. The relief sought is discretionary and may be granted in full or in part or subject to qualifications or conditions. This issue should also be included.

### **Conclusion**

- 18 The Court will order under s 50(2) of the Act that the statement of issues be settled in the form of the schedule.

**SCHEDULE OF STATEMENT OF ISSUES UNDER S 50 OF THE *CIVIL PROCEDURE ACT*  
2010 (Vic)**

In this document:

"**Central Highlands**" means the area defined in the particulars to paragraph 2A of the SFASOC.

"**Code**" means the Code of Practice for Timber Production 2014.

"**Pat's Corner**" means coupe 345-511-0004.

"**SFASOC**" means the Second Further Amended Statement of Claim filed 21 June 2021.

"**Standards**" means the Management Standards and Procedures for timber harvesting operations in Victoria's State Forests 2014.

"**Timber harvesting operation**" has the meaning given in the Code.

"**VicForests**" means the defendant.

"**VicForests' Tree Geebung Special Management Plan**" means the VicForests Special Management Plan: VFSMP319 – Tree Geebung dated 9 October 2020.

"**Wet Forest Coupe**" has the meaning given in paragraph 40H(a) of the SFASOC.

For the purposes of s 50 of the *Civil Procedure Act 2010* (Vic), the key issues in dispute in the proceeding are:

1. Does the plaintiff have standing to bring the proceeding?
2. In carrying out timber harvesting operations in:
  - (a) Pat's Corner; or
  - (b) alternatively, Wet Forest Coupes in the Central Highlands –  
in order to comply with cl 4.3 and Appendix 3 Table 14 as it applies to Tree Geebung of the Standards and/or cll 2.2.2.2 and/or 2.2.2.10 of the Code, is VicForests:
    - (c) required in relation to Tree Geebung to implement:
      - (i) the measures set out in paragraph A of the prayer for relief in the SFASOC; or
      - (ii) the measures set out in paragraphs AA and AAA of the prayer for relief in the SFASOC; or
      - (iii) the measures set out in paragraphs AB and AC of the prayer for relief in the SFASOC; or
      - (iv) any other measures, and if so what measures; or
    - (d) able to meet those obligations by implementing VicForests' Tree Geebung Special Management Plan.