SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2021 0023

WARBURTON ENVIRONMENT INC. (ABN 28 781 873 830) — Applicant

v

VICFORESTS — Respondent

S EAPCI 2021 0039

VICFORESTS — Applicant

v

WARBURTON ENVIRONMENT INC. (ABN 28 781 873 830) — Respondent

JUDGES:	NIALL, EMERTON and KENNEDY JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	24 and 25 May 2021
DATE OF JUDGMENT:	9 July 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 194
JUDGMENT APPEALED FROM:	Warburton Environment Inc v VicForests (No 3) [2021] VSC 35 (Garde J)

PRACTICE AND PROCEDURE – Appeal – Whether inadequate reasons given – Whether judge erred in not granting broader relief – Whether judge erred in not taking into account relevant considerations – Application for leave refused.

PRACTICE AND PROCEDURE – Standing – Standing as a preliminary question – Whether question of standing should be determined as a separate question and in advance of the trial of the proceeding – Application for leave refused.

APPEARANCES:	Counsel	Solicitors
For Warburton in all proceedings	Mr J Korman	Oakwood Legal
For VicForests in all proceedings	Mr E Nekvapil with Ms M Narayan	Russell Kennedy

NIALL JA
EMERTON JA
KENNEDY JA:

Introduction

1 In the proceeding in which the present applications arise, the plaintiff, Warburton Environment Inc ('Warburton'), seeks to restrain VicForests from undertaking certain forest harvest operations in the Central Highlands of Victoria. The plaintiff alleges that, unless restrained, VicForests will breach certain regulatory prescriptions that are designed to protect the Tree Geebung species (*Persoonia arborea*).

2 There have been many interlocutory skirmishes over a number of hearing days, most of which have been heard by Garde J. Presently before the Court are two applications for leave to appeal against interlocutory decisions of Garde J.

3 The first application for leave to appeal is brought by Warburton. Warburton contends that the judge failed to give adequate reasons for granting an injunction to restrain timber harvesting operations in 'specified coupes',[1] this form of restraint not being the form sought by Warburton. Warburton also contends that the judge erred in not granting broader relief extending the restraint to all 'wet forest coupes'[2] in the Central Highlands of Victoria.

4 The second application for leave to appeal is brought by VicForests.[3] It contends that the judge erred in failing to accede to its application that Warburton's standing to bring the proceeding be determined as a separate question and in

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1 Defined as coupes in which a Tree Geebung had been located by VicForests or the Department of Environment, Land, Water and Planning ('DELWP').

2 Defined below at [25].

3 The Application brought by VicForests is in the form of a Cross Appeal. In the event that a Cross Appeal was not the appropriate form of proceeding, VicForests also applied for an extension of time to bring an application for leave to appeal. As the Court has determined the Cross Appeal, it is unnecessary to deal with the application for an extension of time and it will be refused.

advance of the trial of the proceeding.

5 For the reasons that follow neither application for leave to appeal will be granted.

Background

The Tree Geebung

6 The Tree Geebung is a native plant endemic to the wet forests of the Victorian Central Highlands. Its conservation status is listed by DELWP as vulnerable, and Warburton alleges that it is likely to soon become an endangered species, at risk of disappearing from the wild if present land use and other causal factors continue to operate.

7 In its 'threatened species assessment', DELWP confirmed that there are reasonable grounds for assessing the Tree Geebung as critically endangered on the basis of future declines resulting from climate change induced increases in fire frequency and intensity. However, DELWP concluded that there is some degree of uncertainty about the scale of future declines, so the taxon has been very conservatively assessed as endangered.

The regulation of logging in Victoria

8 It is unnecessary to rehearse, in any detail, the complex interwoven regulatory regime that governs logging in State forests in Victoria.

9 All timber resources in Victoria are the property of the Crown.[4] The responsible Minister may, by order, allocate timber in State forests to VicForests for the purpose of harvesting and selling timber resources.[5] On the making of an

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4 *Sustainable Forests (Timber) Act 2004* (Vic) s 12A.

5 Ibid s 13.

allocation order, property in the timber allocated is vested in VicForests.[6] VicForests is required to prepare a timber release plan that must include a schedule of coupes selected for timber harvesting and other matters.[7] VicForests is required to carry out its functions and powers in accordance with any timber release plan.[8] In addition, VicForests is required to comply with any relevant Code of Practice as defined in s 3 of the *Conservation, Forests and Lands Act 1987* (Vic).[9]

10 The relevant code is the Code of Practice for Timber Production 2014 ('Code'). The Code incorporates the Management Standards and Procedures for timber harvesting operations in Victoria's state forests 2014 ('Standards'). The following summary is taken from an earlier decision of the judge in the proceeding and is sufficient for present purposes.[10]

11 Part 2.2 of the Code includes requirements that must be observed during timber harvesting. Under each requirement, the Code lists operational goals and mandatory actions which must be undertaken to achieve the relevant operational goals.

12 Part 2.2.2 contains the requirement to conserve biodiversity. In addressing biodiversity conservation risks, cl 2.2.2.2 applies the precautionary principle to the conservation of biodiversity values. The Code defines this principle to mean:

> …when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken 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 damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[11]

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6 Ibid s 14.

7 Ibid ss 37, 38.

8 Ibid s 44.

9 Ibid s 46.

10 *Warburton Environment Incorporated v VicForests (No 2)* [2020] VSC 738, [10]–[14] (*'Warburton (No 2)'*).

11 Code, Glossary 15.

13 One of the mandatory actions in pt 2.2.2 is to perpetuate the biodiversity of harvested native forests. Relevantly to that end, cl 2.2.2.10 states that timber harvesting operations must:

> Retain and protect…long-lived understorey species to provide for the continuity and replacement of…existing vegetation types within each coupe.

14 Under cl 4.3.1.1 of the Standards, VicForests is required to:

> Apply management actions for rare and threatened flora identified within areas affected by timber harvesting operations as outlined in Appendix 3 Table 14 (Rare or threatened flora prescriptions).

15 For the Central Highlands region, the management action for Tree Geebung is found in Table 14:

> Protect mature individuals from disturbance where possible.

16 Warburton contends that the Standards impose a number of prescriptions relating to the Tree Geebung which are designed for its protection. Warburton alleges that VicForests has undertaken in the past, and intends to undertake in the future, forestry operations in breach of these prescriptions. We note that allegations of past breaches were framed as breaches of certain offence provisions contained in the *Sustainable Forests (Timber) Act 2004*. These allegations were struck out.[12] The proceeding thus concerns threatened future action.

Procedural history

17 There have been many interlocutory applications. In order to deal with the arguments on Warburton's application for leave to appeal it is necessary to set out some parts of the procedural history.

18 On 5 June 2020, Warburton commenced the proceeding by a generally indorsed writ, in which it sought certain relief in respect of VicForests' timber harvesting operations in a single coupe near Warburton called 'Pat's Corner'.

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12 *Warburton (No 2)* [2020] VSC 738, [68].

Warburton alleged that the timber harvesting operations in Pat's Corner contravened s 46(a) of the *Sustainable Forests (Timber) Act 2004*[13] because VicForests failed to: (a) screen timber harvesting operations and new road alignments from view, by means of a 20 metre vegetation buffer; (b) address risks to biodiversity values through management prescriptions in respect of Tree Geebung; and (c) exclude timber harvesting operations within at least 40 metres of developed recreation facilities.

19 On the same day, Warburton filed a summons seeking interim injunctive relief to halt timber harvesting in Pat's Corner until 19 June 2020. As part of its material in support of the injunction, Warburton adduced evidence of the existence of 15 Tree Geebungs in Pat's Corner and evidence that one Tree Geebung had already been knocked down within the coupe.

20 On 9 June 2020, Macaulay J granted a limited injunction that prevented harvesting within a 20 metre buffer from the road and in a designated area that enclosed the 16 identified Tree Geebungs, but did not otherwise enjoin harvesting within Pat's Corner.[14]

21 On 17 June 2020, Warburton filed its statement of claim. The injunction granted by Macaulay J was extended on 19 June 2020 and, on 7 July 2020, the proceeding was set down for trial on 11 November 2020.

22 On 4 August 2020, Warburton filed an amended statement of claim ('ASOC').

23 The ASOC alleged that VicForests had engaged and threatened to engage in forest operations infringing prescriptions in relation to screening buffers and the preservation of Tree Geebung.

24 In relation to Tree Geebung, Warburton pleaded three prescriptions which it alleged had been, or were threatened to be, breached:

(a) the management action in cl 4.3 of the Standards, as adopted by the Code, that

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13 Which requires VicForests to comply with the relevant Code of Practice.

14 *Warburton Environment Inc v VicForests* [2020] VSC 337.

requires VicForests to 'protect mature individuals from disturbance where possible';

(b) the requirement in cl 2.2.2.10 of the Code to retain and protect long-lived understory species (of which Tree Geebung is one) to provide for, among other things, the continuity and replacement of existing vegetation types within each coupe; and

(c) the precautionary principle, which requires VicForests, wherever practical, to avoid serious or irreversible damage to the environment.

(together 'the Geebung prescriptions').

25 The ASOC significantly expanded the proceeding beyond Pat's Corner, and, in respect of Tree Geebung, sought injunctive relief in relation to timber harvesting in any 'Wet Forest Coupe', which was defined to mean that part of the Central Highlands as contains 'Ecological Vegetation Class 30' and/or is included within DELWP's habitat importance model for Tree Geebung.

26 Reflecting the broadening of its case, Warburton in its prayer for relief sought a 50 metre buffer around each Tree Geebung in Pat's Corner, in place of the smaller area designated by the order of 9 June 2020. It also sought a permanent injunction restraining VicForests from carrying out 'Timber Harvesting Operations' in any 'Wet Forest Coupe' unless 'Pre-Harvesting Actions' are carried out and, where Tree Geebungs are identified, 'Harvesting Actions' are carried out. In respect of past contraventions, it sought declarations that VicForests had committed criminal offences.

6 August Hearing

27 On 6 August 2020, Garde J heard a summons that had been filed by VicForests on 30 July 2020, seeking to vary the coordinates of the exclusion area in Pat's Corner and allow for the clearing of road access into the coupe. VicForests relied on expert evidence to establish that the appropriate buffer was either

15 metres or 10 metres from each Tree Geebung (depending on its location). Warburton relied on the expert evidence of Stephen Mueck, a senior botanist and ecologist employed by Biosis Research, who had produced an expert report dated 3 August 2020 (the 'first Mueck Report'). Mr Mueck opined that there should be a harvest exclusion zone of 50 metres around each Tree Geebung.

28 The judge noted that 22 mature Tree Geebungs and a number of seedlings had been located within the Pat's Corner coupe. He varied the injunction to reflect a more nuanced approach to the exclusion zone as reflected in an exclusion map attached to the order. The order was based on a minimum 10 metre buffer to protect each tree. The judge gave brief reasons in which he observed that the Office of Conservation Regulator had recommended a 10 metre buffer.[15]

29 On 10 August 2020, Warburton filed a summons seeking, on an interlocutory basis, a 50 metre exclusion zone around each identified Tree Geebung in Pat's Corner. On the same day, VicForests filed a summons seeking orders that the ASOC be disallowed.

30 On 13 August 2020, Garde J varied the terms of the injunction, including by increasing the buffer to 15 metres.[16]

31 On 31 August 2020, VicForests filed a further summons seeking summary judgment in respect of part of the claim.

32 On 18 September 2020, Warburton filed another summons seeking to restrain timber harvesting in three coupes (Harley, Ben 10 and Fireman Sam) until VicForests had taken all reasonable steps to ensure that it had identified the locations of all Tree Geebungs in those coupes and had served on Warburton a map showing the location and marking the boundaries of each Tree Geebung. The summons also sought to prohibit timber harvesting operations within a 50 metre buffer of each tree.

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15 *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 8 August 2020).

16 Apart from one Tree Geebung in the southern portion which retained a 10 metre buffer.

23 September Hearing

33 On 23 September 2020, Garde J heard the 18 September summons and made interim orders. The interim orders prohibited VicForests from undertaking timber harvesting in Ben 10 and Fireman Sam until:

(a) an exclusion zone marked by red or brightly coloured tape had been established around each mature Tree Geebung 'within the horizontal plane of a 50 metre radius circle so that each Tree Geebung is not less than 15 metres horizontally from the perimeter of that circle';

(b) updated maps showing the exclusion zones were provided to the contractor; and

(c) all personnel working in the relevant coupe were instructed that harvesting within that exclusion zone was prohibited.

34 No injunction was granted in relation to Harley.

35 Justice Garde gave reasons for the interim injunction.[17] He noted that an issue at trial will be the meaning and extent of VicForests' obligation to protect mature, individual Tree Geebungs from disturbance where possible. He referred to expert reports filed by both Warburton and VicForests, including a supplementary report from Mr Mueck (the 'second Mueck Report'). In the second Mueck Report, Mr Mueck opined that in order to protect mature Tree Geebungs, a circular protection area with a 50 metre radius should be established around each tree so that each tree is not less than 15 metres from the perimeter of the circle. It would follow that each tree must be enclosed within, but need not be at the centre of, the circle. Presumably this is because the trees are sometimes found in clusters or in close proximity to each other and the formulation could accommodate more than one tree in a given circle but provide adequate protection for them all.

36 In his reasons, the judge noted that the first issue was whether there was a

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17 *Warburton Environment Inc v VicForests* (Unreported, Supreme Court of Victoria, Garde J, 23 September 2020).

need for a survey within each coupe. In that respect, the judge referred to the affidavit evidence of Katerina Poulakis, the corporate counsel employed by VicForests.

37 The judge recorded Ms Poulakis' evidence that VicForests had the benefit of a DELWP desktop pre-harvest survey and that VicForests' operation planners undertook pre-harvest surveys on each coupe. In relation to Fireman Sam, Ben 10 and Harley, a VicForests' biodiversity research officer had directed a field survey which entailed a forester walking each coupe by diagonally transecting the coupe at 50 metre intervals and recording each Tree Geebung location. Multiple specimens were located in Fireman Sam and Ben 10. No specimens were located in the northern section of Harley and no logging was intended for the southern section.[18]

38 The judge recorded Warburton's submission that a 30 metre transect inspection would have been preferable, but said he was satisfied, for the purposes of the interim injunction, that VicForests had conducted sufficient surveys to locate mature trees in each coupe. However, the judge found that the balance of convenience favoured the buffer area proposed by Mr Mueck.

39 On 24 September 2020, Warburton filed a summons seeking leave to file a further amended statement of claim ('FASOC').

40 On 5 October 2020, Warburton filed another summons seeking the broadening of its injunctive relief. That summons sought the following orders:

> 1. Until further order, the defendant, whether by itself, its servants, agents or contractors or howsoever, must not carry out timber harvesting operations in any coupe:
>
> a. which in the Central Highlands region, being the area described in the map that is exhibited as exhibit KAL-1 to the affidavit of Kwabena Adjei Larbi dated 5 October 2020
>
> where that coupe is:
>
> b. wholly or partly located within the Department of Environment, Land, Water, and Planning (**DELWP**) Ecological

[18] This explains why no injunction was granted in respect of Harley.

Vegetation Class 30 ("Wet Forest");

or

c. wholly or partly located within the DELWP Ecological Vegetation Class 31 ("Cool Temperate Rainforest"); or

d. wholly or partly located within the DELWP Habitat Importance Model for Tree Geebung; or

e. located within 5 kilometres of a Tree Geebung:

i. identified in DELWP's Forest Protection Survey Report for that coupe;

or

ii. identified by VicForests' own survey or reconnaissance work

(collectively, **Wet Forest Coupes**)

until:

f. the defendant has caused a person experienced in the identification of tree geebungs to survey the coupe for the presence of tree geebungs utilising transects spaced at a maximum of 30 metres;

g. the Defendant has established exclusion zones marked by red or brightly coloured tape around each tree geebung identified in the survey referred to in subparagraph (e) or otherwise known by VicForests to exist, such zone to be within the horizontal plane of a 50 metre radius circle so that each tree geebung is not less than 15 metres horizontally from the perimeter of that circle;

h. the defendant has provided updated maps showing the exclusion zones to the contractor; and

i. the defendant has instructed all personnel working in the coupe not to carry out timber harvesting within the exclusion zones.

2. Order 1 does not prohibit the defendant from felling or cutting trees or parts of trees in order to address a serious risk to human safety.

41 It is convenient to highlight some features of the orders sought in the 5 October summons. Although the ASOC filed on 4 August 2020 had expanded the claim with respect to Tree Geebungs to any wet forest coupe in the Central Highlands, up to this point injunctive relief had only been sought in respect of

identified coupes: Pat's Corner, Fireman Sam, Ben 10 and Harley. Secondly, although Warburton's earlier summons had sought orders requiring VicForests to undertake pre-harvest surveys in the identified coupes, this was the first time that Warburton sought specific orders in relation to the transect intervals that were to be used in such surveys.

6 October Hearing

42 On 6 October 2020, the judge heard the 5 October summons for the purpose of determining whether there should be interim relief. At the hearing, VicForests identified five coupes that it said were shortly to be harvested and submitted that any interim order should be confined to those coupes. The five coupes identified by VicForests were: Gaboon, Maxibon, Frankincense, Myrrh and Sun Downies. Warburton continued to press for an order covering all wet forest coupes.

43 During argument it emerged that Warburton was not made aware, in a timely manner, when coupes would be harvested and this had led to last minute injunction applications being made to the Court. The judge described the problem as one of 'cat and mouse'. That led the judge to raise with VicForests whether it should give advance notice to Warburton of its intended harvesting. This exchange resulted in what was to become the 'letter writing regime', whereby VicForests would advise the Court and Warburton in advance of when coupes were to be harvested.

44 It is also clear from the oral argument that Warburton pressed for a pre-harvest survey at 30 metre intervals to apply to all wet forest coupes before harvesting could be undertaken.

45 In the result, the judge made further interim orders on 6 October, which were relevantly in the following terms:

> Until 4pm on Thursday 15 October 2020 or further order, the defendant, whether by itself, its servants, agents or contractors or howsoever otherwise, must not carry out timber harvesting in Gaboon or Myrrh coupes unless and until:

(a) a person or persons experienced in the identification of tree geebungs has surveyed the coupe for the presence of tree geebungs utilising transects spaced at a maximum of 30 metres;

(b) an exclusion zone marked by red or brightly coloured tape has been established around each mature tree geebung ('exclusion zones'), such zone to be within the horizontal plane of a 50 metre radius circle so that each tree geebung is not less than 15 metres horizontally from the perimeter of that circle;

(c) updated maps showing the exclusion zones are provided to the contractor; and

(d) all personnel working in the relevant coupe are instructed not to carry out timber harvesting within the exclusion zones.

46 The order also included, under 'Other Matters', the following 'letter writing regime':

A. On or before 10am on Monday 12 October 2020, the defendant's solicitor is to send a letter to the Court with a copy to the plaintiff's solicitor advising as to each of the coupes in the Central Highland region on which a tree geebung has been identified by the Department of Environment, Land, Water and Planning or the defendant which are proposed for harvesting on or before 22 October 2020:

i. the surveys conducted in relation to each coupe including transect distance, if any;

ii. the protection measures, if any, for each tree geebung.

47 In his reasons for making these orders, the judge recognised that harvesting was imminent in Gaboon and Myrrh. In relation to Gaboon, the judge noted that harvesting had commenced on 2 October but had stopped. The judge first addressed the adequacy of the pre-harvest survey conducted by VicForests in relation to that coupe. He referred to evidence filed by Warburton that some, perhaps many, individual Tree Geebungs had not been identified in the pre-harvest survey and that some operations had been undertaken within a tree buffer. The judge also noted evidence of the construction of a landing area for Gaboon within 50 metres of a mature Tree Geebung.

48 In the light of that evidence, the judge concluded that it was appropriate for a more comprehensive survey to be undertaken before harvest in both Gaboon and Myrrh. In those coupes, he accepted the evidence of Mr Mueck that surveys should

be undertaken using 30 metre transects. He added that while there may be further evidence as to the preferred method of survey in the future, it was appropriate to act on Mr Mueck's evidence with respect to Gaboon and Myrrh.

49 The judge went on to say that there needed to be much more open and effective communication between the parties to avoid last-minute applications for interim injunctions. Noting that too many days had been expended on applications of that nature, his Honour proposed that the defendant's solicitors write to the Court detailing the coupe harvesting schedule for coupes where a Tree Geebung had been located, the surveys conducted in relation to each coupe, and the protection measures, if any, for each Tree Geebung. This protocol — the 'letter writing regime' — was recorded in 'Other Matters' on the order made by the judge.

50 In response to Warburton's claim for a broader injunction, the judge said that, at least for the present time, the proposed injunction was too wide and the letter writing regime should be sufficient to ensure that the Court, and the parties, were made aware of what was proposed. The judge adjourned the interlocutory injunction application to 15 October 2020.

51 In the meantime, on 12 October, the solicitors for Warburton emailed the judge's associate and VicForests, enclosing a proposed amended summons. Relevantly, the proposed amendments replaced paragraphs (g), (h), (i) and (j) of its summons dated 5 October 2020 with a new paragraph (g), and added a new paragraph 2. The new paragraphs 1(g) and 2 were in the following terms:

> g. where the survey referred to in subparagraph (f) (**Survey**) has identified the presence of one or more Tree Geebungs within 50 metres of any area within the coupe which is to be harvested (**Identified Tree Geebungs**):
>
> i. the defendant has prepared a map for that coupe showing:
>
> 1. the locations of all Identified Tree Geebungs identified in the Survey; and
>
> 2. marking exclusion zones on the map such that each Identified Tree Geebung is located in an exclusion zone within the horizontal plane of a 50 metre circle, and not

less than 15 metres horizontally from the perimeter of that circle; and

ii. the defendant has served that map on the plaintiff.

…

2 Until further Order, the defendant, whether by itself, its servants, agents or contractors or howsoever, must not carry out timber harvesting operations within the horizontal plane of a 50 metre circle enclosing each Identified Tree Geebung, such that the Identified Tree Geebung is located not less than 15 metres horizontally from the perimeter of that circle.

52 Although the proposed amended summons occupied much of Warburton's written case in this Court, it assumed much less significance on the hearing of the application for leave to appeal. It will be necessary to return to it.

15 October Hearing

53 On 15 October 2020, the judge heard argument on the interlocutory injunction sought by the summons of 5 October. At the conclusion of argument, the judge extended the interim orders in respect of Gaboon and Myrrh. Much of the hearing on that day was taken up with arguments about standing.

16 October Hearing

54 On 16 October 2020, Warburton applied for further interim relief in respect of another three coupes: Flagstaff, Frankincense and Maxibon. That application was heard and orders were made in similar terms to those made with respect to Gaboon and Myrrh.

55 The judge gave brief reasons for the orders made on 16 October 2020. He noted that VicForests had, on 9 October 2020, prepared a special management plan for the Tree Geebung in the Central Highlands region ('Plan'). VicForests argued that the Plan provided for sufficient and appropriate protective measures to be adopted pending trial. The judge noted that the Plan had been approved by the Chief Conservation Regulator on 12 October 2020, but observed that the Plan had not

been exposed to public comment or submissions, an independent peer group, or expert review before approval was given.

56 The judge set out some features of the Plan, including the management prescriptions that were proposed in relation to the Tree Geebung. His Honour recorded that the objectives of the Plan were to:

(a) support the persistence of Tree Geebung at sites across its range;

(b) ensure that Tree Geebung is maintained and perpetuated within forests managed for timber harvesting;

(c) support continuity and replacement of long lived understory species within coupes; and

(d) ensure mature specimens of Tree Geebung are protected from damage by timber harvesting operations through implementation of clear planning and operational processes.

57 The management prescriptions in the Plan included the following features:

(a) the definition of mature Tree Geebung as one having a diameter at breast height equal to or greater than 10 cm;

(b) no requirement for protection and marking of all individual Tree Geebung;

(c) the assumption that protecting multiple Tree Geebung specimens in excluded areas or other retained habitats within the gross coupe area is an effective management action;

(d) the further assumption that retention of individual mature Tree Geebung outside of exclusion areas is not a priority because retained individuals become prone to fire, defoliation or windthrow due to exposure; and

(e) despite the above, the goal that individual mature Tree Geebung are to be protected where possible to maximise the opportunity for mature individuals to contribute to Tree Geebung regeneration and recruitment, accepting that these isolated individuals are unlikely to survive.

58 The Plan requires the conduct of desktop assessments, pre-harvest field

surveys and desktop section planning. Sightings of mature Tree Geebung during field visits are to be recorded. Targeted species surveys for Tree Geebung are directed to occur at transects no greater than 100 metres apart, and can be conducted in conjunction with hollow bearing tree surveys. The Plan states that individuals, whether mature or immature, that are not connected to a cluster or adjacent to existing boundaries or other exclusion areas are not a priority for protection. It required 'feasible and practical options' to be considered to protect: very large Tree Geebung (greater than 30 cm at breast height); isolated mature individuals to promote seed development and regeneration; and Tree Geebung in coupes where they occur infrequently.

59 In respect of the specific coupes that were the subject of proposed interim orders, the judge noted that Tree Geebungs had been identified in Flagstaff, Maxibon and Frankincense. The question was what management regime should apply to these coupes. Before the judge were competing management regimes, reflected in the reports of Mr Mueck on the one hand and the Plan on the other.

60 The judge identified the key differences between the Plan and the Mueck reports as being: whether surveys should be conducted in transects of 100 metres (Plan) or 30 metres (Mr Mueck); whether individual mature trees were to be protected when not in clusters and if so to what extent; and differences in buffer areas and marking when coupes were harvested.

61 The judge concluded that there were serious issues to try. The balance of convenience, at least for the time being, favoured protection being given to the three coupes in the manner recommended by Mr Mueck. He observed that it would be possible in the future to carry out further harvesting of those coupes should a lesser protection regime ultimately be accepted. The judge reiterated the value of the letter writing regime that had commenced with his orders of 6 October.

62 On 9 November 2020, the judge disallowed the ASOC and directed Warburton to file a proposed amended statement of claim. The proposed ASOC was

filed on 17 November 2020 ('PASOC').

8 December Hearing and orders of 8 February 2021

63 The orders that are the subject of Warburton's application for leave to appeal were made on 8 February 2021, following a hearing that had taken place on 8 December 2020.

64 It is convenient to start with the orders that were made and then turn to the judge's reasons for making those orders.

65 In relation to Warburton's application for an injunction covering all of the wet forest coupes, the judge made the following orders:

> 4. Paragraphs 5–8 to this order apply to coupes in the Central Highlands region of Victoria on which a mature Tree Geebung has been identified by the Department of Environment, Land, Water and Planning or by the defendant and which are proposed for harvesting by the defendant ('specified coupe').
>
> 5. No less than 14 days prior to the day when a specified coupe is to be harvested, the defendant is to send a letter to the Court with a copy to the plaintiff's solicitor advising of:
>
> (a) the surveys conducted in relation to that coupe for tree geebung including transect distance, if any;
>
> (b) the protection measures, if any, for each Tree Geebung; and
>
> (c) whether the defendant seeks the plaintiff's agreement to modify the requirements of paragraph 6 of this order.
>
> 6. Until the final determination of this proceeding or further order, the defendant, whether by itself, its servants, agents or contractors or howsoever otherwise, must not carry out timber harvesting in a specified coupe unless and until:
>
> (a) a person or persons experienced in the identification of tree geebung has surveyed the coupe for the presence of tree geebung utilising transects spaced at a maximum of 30 metres;
>
> (b) an exclusion zone marked by red or brightly coloured tape has been established around each mature tree geebung ('exclusion zones'), such zone to be within the horizontal plane of a 50 metre radius circle so that each tree geebung is not less than 15 metres horizontally from the perimeter of that circle;

(c) updated maps showing the exclusion zones are provided to the contractor; and

(d) all personnel working in the relevant coupe are instructed not to carry out timber harvesting within the exclusion zones.

7. The plaintiff and the defendant may agree in writing to the modification of the requirements of paragraph 6 above in relation to a specified coupe and in that event, the defendant must not carry out timber harvesting other than in accordance with the requirements of paragraph 6 as so modified.

8. This order does not prevent the felling or cutting a tree or part of a tree as a safety measure.

66 The judge did not extend the orders to all wet forest coupes as Warburton had requested.

67 The judge's reasons[19] dealt with four issues: standing; leave to amend the statement of claim; the interlocutory injunction; and confidentiality orders.

68 In relation to the interlocutory injunction, the judge referred to Warburton's summons of 5 October 2020, noting that it sought orders prohibiting timber harvesting operations in coupes in the Central Highlands region, including coupes within 5 kilometres of a previously identified Tree Geebung, until:

(a) a 30 metre transect survey for Tree Geebung has been completed;

(b) VicForests has established 50 metre circular exclusion zones marked by red or brightly coloured tape around each Tree Geebung with each Tree Geebung not less than 15 metres from the perimeter;

(c) updated maps showing exclusion zones have been provided to the contractor; and

(d) personnel have been instructed not to carry out timber harvesting within the exclusion zones.[20]

69 The judge identified the evidence as being the two Mueck reports filed on

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19 *Warburton Environment Inc v VicForests (No 3)* [2021] VSC 35 ('Reasons').

20 Ibid [26].

behalf of Warburton and the Plan relied on by VicForests. The judge then described the evidence adduced by VicForests on the impact on its logging operations if a 50 metre exclusion zone (or buffer) was imposed around each Tree Geebung. That evidence was contained in an affidavit from Mr Deon Kriek. Mr Kriek deposed that a 50 metre buffer would result in an average loss of harvestable area of 42 per cent of each coupe. Based on that estimate the judge continued:

> Mr Kriek deposed that there are 165 harvesting coupes and 34 roadline coupes listed as 'not started' or 'active' that have a Tree Geebung recorded within 500m. The 165 harvesting coupes have an estimated net area of 3,254ha. Assuming that 42% of the estimated net area is impacted by 50m buffers, there would be a loss of harvestable area of 1,367ha. Taking into account other operational constraints which result in 78% of the estimated net area not being harvested, there would be a loss of 2,538ha.
>
> Mr Kriek estimated that the decrease in net harvestable area would exceed 1 million m^3 assuming a 42% decrease in net harvestable area and 2 million m^3 assuming a 78% decrease. Application of the same percentages to a further 61 coupes where Tree Geebung have not been observed within 500m but which overlap with high likelihood habitat would result in the loss of about 462,400m^3 to 859,200m^3 of net harvestable area.
>
> Mr Kriek deposed that for the 605 coupes in the Central Highlands listed as 'not started' or 'active' within the scope of the interlocutory injunction sought by Warburton Environment, VicForests would incur 304 survey days (1,522 hours) assuming that it takes 1.2 hours/ha to conduct a survey based on 30m transects.[21]

70 In answer, Warburton adduced evidence that the cost of a 30 metre transect survey would be approximately $44 per hectare, which should be compared with the expected coupe revenue of approximately $36,390 per hectare.

71 In relation to Mr Mueck's requirements for buffers and surveys, the judge stated that:

> Mr Mueck's evidence that a 50m buffer is the minimum protection required by a mature Tree Geebung has been acted on by the Court on a number of occasions in granting interim injunctions. There is at least at present no competing scientific evidence which might point to an alternative protection or buffer prescription. No reason has been advanced why Mr Mueck's prescription as to surveys and buffers should not be adopted pending the trial.[22]

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21 Ibid [32]–[34].

22 Ibid [41].

72 The judge gave five reasons for finding that the balance of convenience favoured the grant of an injunction.[23] First, he noted the evidence suggested that without protection there is a significant risk of damage to Tree Geebungs through harvesting. Secondly, the Code adopts the precautionary principle. Thirdly, VicForests' potentially lost revenue was not permanently forgone and the forest would be available for harvest should the plaintiff fail, albeit with some additional inconvenience and cost. The fourth reason concerned the conduct of 30 metre transect surveys and was in the following terms:

> the evidence does not suggest that the conduct of 30m transect surveys adds significantly to the cost of surveys. Under the [P]lan, targeted species surveys for Tree Geebung already occur on the following basis:
>
> (1) to confirm existing detection records in the field;
>
> (2) where records exist within 500m of the coupe, or where the coupe overlaps with high quality habitat as mapped in the habitat distribution;
>
> (3) on transects no greater than 100m apart;
>
> (4) in conjunction with hollow-bearing tree pre-harvest surveys; and
>
> (5) where a mature Tree Geebung is recorded within 15m of the detection to identify clusters.[24]

73 The fifth reason was that the cost of 30 metre transect surveys was about $44 per hectare.

74 The judge said that the grant of an injunction would preserve the Tree Geebung by ensuring that 50 metre buffer areas were provided within coupes until trial. He noted that this may cause a modification to harvesting plans, but concluded that the costs of postponing harvesting of buffer areas (which would become available for harvest if the proceeding failed and injunction were lifted) was not likely to be significant.[25]

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23 Ibid [42].

24 Ibid.

25 Ibid [43].

75 After referring to the principles set down in *Bradto Pty Ltd v Victoria*,[26] the judge said he was satisfied that the lowest risk of injustice involved granting the injunction, essentially balancing the risk that Tree Geebungs would be destroyed against the delayed revenue and inconvenience that VicForests would sustain as a result of an injunction. As to the form of the injunction, the judge said:

> In granting an interlocutory injunction, I adopt the form of injunction that was granted on 16 October 2020. The letter writing regime has been effective to ensure that the Court and Warburton Environment are advised of the harvesting schedule and intended protection measures. This process should continue. The injunction will be modified to permit the parties to agree on alternative survey and protection arrangements for an individual coupe, should this be necessary. This will avoid the need for the parties to return to court to seek a modification of the injunction by consent.[27]

The proposed grounds of appeal

76 In its application for leave to appeal, Warburton advanced the following grounds:

> 1. The primary judge erred in proceeding on the basis that [Warburton] did not seek the orders set out in the proposed amended summons emailed to the Court on 12 October 2020, and ought to have granted leave to amend the filed summons.
>
> 2. The primary judge:
>
> (a) erred in failing to give reasons for not making orders in the form sought by [Warburton]; and
>
> (b) ought to have made orders in the form sought by [Warburton].

77 During the hearing, Warburton sought leave to amend its grounds by adding the following additional ground:

> 3. The primary judge erred in the exercise of his discretion by failing to take account of relevant considerations, namely:
>
> (a) the evidence and submissions that Tree Geebungs were likely to exist in coupes that were not 'specified coupes' as defined in Order 6 of the Orders of 8 February 2021;
>
> (b) the evidence and submissions that Tree Geebungs in coupes

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[26] (2006) 15 VR 65, 73 [35]; [2006] VSCA 89 (Maxwell P and Charles JA).

[27] Reasons [46].

> that were not 'specified coupes' were likely to be destroyed when those coupes were harvested
>
> and ought to have made the orders sought by the applicant.

78 VicForests opposed leave to amend to add ground 3. However, VicForests very fairly accepted that it was in a position to meet the ground, and would suffer no prejudice by the grant of leave to amend. In those circumstances leave to add proposed ground 3 should be given.

Ground 2: failure to give adequate reasons

79 Warburton submits that the judge did not grant relief in the form it sought in circumstances where it was entitled to 'precisely the relief sought and not a watered down version of that relief'.

80 Warburton referred to its evidence and submissions before the judge, which were to the following effect:

(a) A serious question to be tried had been found on earlier occasions and there was no need to further ventilate that question.

(b) The Tree Geebung is provisionally endangered and prospects of its extinction are increasing. If the injunction were refused, the Tree Geebung would be likely to become locally extinct in harvested coupes where it was formerly present.

(c) A 50 metre buffer was the minimum protection required for each plant.

(d) Evidence of past outcomes established a considerable risk of damage 'absent requisite buffers'. In this respect Warburton submitted that it had surveyed 22 coupes harvested by VicForests during 2019 and 2020, in which DELWP had identified the existence of Tree Geebungs. A total of 238 Tree Geebung had been identified in DELWP surveys. The surveys found that 200 of these had been destroyed in the course of VicForests' harvesting operations. A further 19 had been damaged. A total of 92 per cent were destroyed or damaged, and only 19 of the 238 trees had been protected from disturbance and remained intact.

(e) DELWP surveys were no substitute for accurate pre-harvest surveying at 30 metre transects. DELWP only surveyed selective coupes, and a small portion of the coupe. The most extreme case was DELWP's survey in Bungalow coupe which identified two trees, in contrast to the Warburton survey, which identified 78 trees.

(f) Mr Mueck's evidence about the areas that should be surveyed in order to adequately protect the species is definitive with no competing scientific opinion.

81 In this Court, Warburton referred to the opinion in the second Mueck Report that a conservative approach would be to investigate coupes which:

(a) support a record of Tree Geebung within 5 kilometres;

(b) are dominated by Wet Forest (EVC 31) or otherwise have remnants of Cool Temperate Rainforest (EVC 31) within 1 kilometre; or

(c) are included within or otherwise include a portion of the Habitat Importance Model for Tree Geebung.[28]

82 Warburton took the Court to an affidavit made by Jake McKenzie, who inspected nine coupes where logging had not occurred. The effect of Mr McKenzie's evidence was that in six of the coupes, DELWP had underestimated the prevalence of Tree Geebung. Further, no DELWP surveys were undertaken in two coupes: Harley and Ben 10. In those coupes populations of 120 and 67 Tree Geebungs respectively were located in surveys conducted on behalf of Warburton.[29]

83 Warburton also referred to surveys undertaken after logging had occurred. In those coupes, some 85 per cent of Tree Geebungs had been destroyed. This was said to show that, without the injunction, logging would occur and plants would not be identified or protected and were unlikely to survive the harvesting operation.

84 In oral argument, counsel for Warburton concentrated his submissions on

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[28] Supplementary Expert Report of Stephen Mueck dated 3 September 2020.

[29] Supplementary Affidavit of Jake McKenzie sworn 12 October 2020, [7].

grounds 2 and 3, namely that the judge had not given adequate reasons for declining to grant an injunction in the terms sought by Warburton and that in granting the more limited injunction, the judge had failed to take into account relevant considerations.

85 Warburton submits that its application for an injunction was made in respect of all wet forest coupes and that it sought a pre-harvest survey of all coupes. It says that having regard to the form of the order made, that submission must have been rejected because surveys are only required in respect of those coupes in which there is an identified Tree Geebung. In other words, without that trigger, coupes that might contain Tree Geebungs could be logged without the need for a pre-harvest survey using 30 metre transects.

86 Warburton submits that it is not possible to know why the form of order that it sought was not made: whether it was because there was no serious question to be tried, or because the balance of convenience did not favour it.

87 Warburton also submits that there is no record in the reasons for judgment of the evidence supporting the need for surveys in all wet forest coupes. Warburton referred to the evidence showing that there were coupes which were not surveyed by DELWP in which Tree Geebungs could be found and its submission that if harvesting takes place where Tree Geebungs have not been located by DELWP or VicForests, any trees that might be there will be destroyed.

88 Warburton submits that the findings made by the judge compelled the making of the broader injunction it had sought.

Consideration

89 The obligation to give reasons for a decision is a hallmark of the exercise of judicial power. It is well established that the nature of the obligation and the content of the duty to give reasons depends on the nature of the hearing and the issues that must be determined. In the context of a decision in a criminal trial before a judge

alone Nettle J said:

> Since parties must be able to see the extent to which their cases have been understood and accepted, a trial judge will ordinarily be expected to expose his or her reasoning on points critical to the contest between the parties. This applies both to evidence and to argument. If a party relies on relevant and cogent evidence which the judge rejects, the judge should provide a reasoned explanation for the rejection of that evidence. If the parties advance conflicting evidence on a matter significant to the outcome, both sets of evidence should be referred to and reasons provided for why the judge prefers one set of evidence to the other. Similarly, while a judge is not required to deal with every argument and issue that might arise in the course of a trial, if a party raises a substantial argument which the judge rejects, the judge should refer to it and assign reasons for its rejection. And in providing reasons, the judge is required to make apparent the steps he or she has taken in reaching the conclusion expressed, for reasons are not intelligible if they leave the reader to speculate as to which of a number of possible paths of reasoning the judge may have taken to that conclusion. Failure sufficiently to expose the path of reasoning is therefore an error of law.[30]

90 In the paragraph preceding the one just quoted, Nettle J said that the extent of the obligation may depend on the circumstances of the case, but that reasons must identify the relevant principles of law, refer to relevant evidence, state the judge's findings upon material questions of fact, and provide an explanation for those findings and the ultimate conclusions reached by the judge.[31]

91 In considering an argument about the adequacy of a judge's reasons in a serious injury application under the s 134 AB of the *Accident Compensation Act 1986*, Kaye JA emphasised the importance of the nature of the exercise, and the manner in which the hearing is conducted, to any assessment of the adequacy of reasons.[32] After setting out a passage from the oft cited reasons of Nettle JA in *Hunter*,[33] Kaye JA referred to the fact that in a serious injury application there is often little cross examination, and the legal test of serious injury is highly evaluative and does not finally determine rights. He went on to say that, in an appropriate case, reasons can be assessed to be adequate by a combination of what is expressly stated, and the

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30 *DL v The Queen* (2018) 266 CLR 1, 44–5 [131]; [2018] HCA 26 (citations omitted).

31 Ibid 43–44 [130].

32 *Woolworths Ltd v Warfe* [2013] VSCA 22; *Bedeux v Transport Accident Commission* (2016) 76 MVR 50; [2016] VSCA 127.

33 *Hunter v Transport Accident Commission* [2005] VSCA 1, [21].

inferences that necessarily arise from what is expressly stated.

92 As Warburton accepted, the level of detail and analysis that is expected of reasons following a trial may not be required in reasons for interlocutory decisions. Indeed, reasons may not be required at all for certain evidentiary rulings and procedural applications.[34]

93 It may be accepted that, absent some special reason, a judge is required to give reasons for granting or refusing an interlocutory injunction. Those reasons should address the critical issues in the application, which will usually revolve around whether the plaintiff has established a serious question to be tried and explain where the balance of convenience lies. Without wishing to be prescriptive, reasons on an injunction application are unlikely to require any detailed recitation of the evidence and, having regard to the nature of the exercise, there may be no occasion to resolve factual questions. It will generally be necessary for the reasons to disclose an understanding of the allegations and the basis on which the serious question arises, identify the status quo, and give a brief explanation for why the order is made. It will also usually be important that the judge reveal, through his or her reasons, an understanding of the impact that the making or refusal of the injunction is likely to have on the affected party.

94 Of course, these general observations have to be seen in the light of individual circumstances. In many cases, the existence of a serious question will not be in dispute. The question of convenience may be finely balanced and the decision of the judge may turn on a broad brush assessment of where the risk of injustice lies. Much will be uncertain, and it will be difficult to articulate all the factors that come together to inform the result.

95 A judge considering an interlocutory application is often required to balance incommensurables: in this case the preservation of threatened species against the

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34 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 270 (Mahoney JA), 279 (McHugh JA).

economic and livelihood considerations of those involved in logging. Those issues arise in the context of a regulatory system that itself balances these interests. Crafting interlocutory orders can be difficult, especially if they are not of a kind that are 'all or nothing'.

96 Two other points are critical. First, in modern litigation, as here, the interlocutory steps leading to trial are often closely managed by a judge. That involvement will give the judge an understanding of the issues, the evidence, and the real points of contest, built up over the course of multiple interactions with the parties. The parties will, of course, share that knowledge. In such a case, reasons given on one occasion can be informed by reasons given on earlier applications or by the manner in which the parties have conducted the litigation, especially where successive applications have common issues or themes.

97 Secondly, one purpose for giving reasons is to enable a disappointed party to consider whether or not to appeal. In the context of an interlocutory injunction, that objective assumes somewhat less importance given that an injunction does not involve any final determination of rights and the parties may, in an appropriate case, return to the primary judge to vary orders. Of course, in most cases that can only occur if there has been a material change of circumstances — but where the judge has ongoing supervision of the matter, there may be an opportunity to seek variations to interlocutory orders to deal with evolving situations. The Court remains able to supervise the injunction and it is not uncommon for orders to be enlarged or contracted where circumstances change.

98 Before turning to the reasons and orders of 8 February 2021, it is appropriate to summarise the position that had been reached by 16 October 2020:

(a) Warburton had applied for, and been granted, interim and interlocutory orders in respect of Pat's Corner, Ben 10, Fireman Sam, Gaboon, Myrrh, Flagstaff, Maxibon and Frankincense.

(b) An injunction had been refused in relation to Harley.

(c) In respect of each coupe that was the subject of an injunction there was evidence of at least one Tree Geebung being located within the coupe.

(d) The injunctions imposed protective measures in the form of a buffer around each identified Tree Geebung. As at 16 October, the survey was required to identify each individual tree and the buffer required was that proposed by Mr Mueck.

(e) Where the number and location of trees was in dispute, an order for a survey was made in the manner recommended by Mr Mueck.

(f) Warburton's broader application for an injunction in respect of every wet forest coupe had not yet been determined.

99 That position had been clearly articulated by the judge in earlier rulings and would, or ought to, have been well understood by the parties.

100 In considering the issues, it is also important to recall the relevant protective measure sought by Warburton, and adopted by the judge, was to place a 50 metre buffer around each tree to create an exclusion zone in which there could be no harvesting operations. In order to make that effective, it was necessary for VicForests to locate each tree in the coupes it intended to harvest.

101 In turn, identifying Tree Geebung required VicForests to undertake a survey pre-harvest. The competing management regimes that the parties proffered were identified by the judge in his reasons on 16 October. VicForests relied on the Plan, which provided for surveys at 100 metre transects. However, Warburton relied on Mr Mueck's expert reports, which required a 30 metre transect.

102 The judge accepted Mr Mueck's approach, but the effect of his order was to confine the coupes in which such a survey was required to those coupes in which at least one Tree Geebung had already been identified. Obviously enough, that relies on VicForests or DELWP undertaking a survey or inspection to see if there are any examples of the species present in a coupe. To that extent, the form of order made did not exactly coincide with the form of order sought by Warburton.

103 In our view, there was no failure by the judge to give adequate reasons for this decision. Read fairly, the judge's reasons reveal that he was not persuaded that the form of order sought by Warburton was appropriate, and the reasons for that conclusion can be sufficiently understood having regard to what is expressed in his reasons and the context in which they were given.

104 First, a clear premise on which the injunction was granted was that VicForests and DELWP were conducting pre-harvest surveys which were at least sufficient to identify the presence of Tree Geebung if one or more trees were present in a coupe. This is consistent with the fact that, when Warburton had earlier applied for injunctions in respect of particular coupes, it was able to establish that at least one Tree Geebung was present (the crucial issue being the identification and protection of *all* the Tree Geebung within those coupes).

105 Secondly, contrary to Warburton's submission, the statement in the reasons that, '[n]o reason has been advanced why Mr Mueck's prescription as to surveys and buffers should not be adopted pending the trial',[35] did not mean that the pre-harvest surveys undertaken by VicForests and DELWP were to be rejected completely. Rather, when read fairly and in context, including by reference to the form of order made, the reasons disclose that the judge was of the view that the pre-harvest surveys by DELWP and VicForests provided a sufficiently suitable trigger for the more comprehensive regime of surveys and buffers recommended by Mr Mueck.

106 Thirdly, in light of the arrangements that had been in place since October 2020, and the fact that surveys by DELWP and VicForests would be conducted in each coupe to be harvested, it seems plain that his Honour considered that the maintenance of the letter writing regime, with its focus on specified coupes, should continue and was effective.[36]

107 In our opinion the reasons adequately grapple with the issues that had been

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35 Reasons [41].

36 Ibid [46].

raised by the parties on an interlocutory basis. In one sense, the outcome represented an imperfect compromise pending the determination of the parties' legal rights, but to a real extent it favoured the position put by Warburton. The central issues for the judge were whether the injunction he had granted in respect of named coupes should be extended to all of the coupes in the Central Highlands, and whether the protections in the Plan or those recommended by Mr Mueck should be adopted. He resolved those questions adversely to VicForests.

108 The risk that the form of order leaves open is that one or more Tree Geebungs will be present in a coupe but entirely missed by pre-harvest surveys by DEWLP and VicForests. However, the judge was entitled to accept that the letter writing regime had been effective, and there was no evidence that the regime had failed to protect any Tree Geebungs since its implementation in October 2020. In those circumstances, it emerges clearly enough from the reasons that the judge considered that the form of order he proposed, and which reflected earlier orders, was adequate to protect the species pending trial.

109 We are fortified in our conclusion that the reasons were adequate, given, as ground 3 of the current application shows, Warburton is sufficiently aware of the judge's reasons to argue that an injunction confined to specified coupes was not justified on the evidence, failed to achieve the protection that the reasons show was required, and is a cause of significant injustice. In other words, Warburton was under no real disadvantage in arguing that the decision was infected by error of a kind that can and should be corrected in this Court.

110 In our opinion the reasons were adequate to the task. Ground 2 should be rejected.

Ground 3: failure to take into account relevant considerations

111 Under this proposed ground, Warburton asserts that the judge failed to take into account relevant considerations namely:

(a) the evidence that Tree Geebungs were likely to exist in coupes that were not 'specified coupes' as defined in Order 6 of the Orders of 8 February 2021; and

(b) the evidence and submissions that Tree Geebungs in coupes that were not 'specified coupes' were likely to be destroyed when those coupes were harvested.

Consideration

112 An interlocutory order for an injunction is a matter of practice and procedure. This Court must exercise particular caution in reviewing the decision of the primary judge. Before the Court will intervene, there must be error in principle, and the decision appealed from must work a substantial injustice to one of the parties.[37] The question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration.[38]

113 Warburton has failed to make out this ground.

114 The letter writing regime had been in place since October 2020. The deficiencies that Warburton identified in the surveys conducted by VicForests and DELWP certainly undermined any suggestion that they were sufficiently comprehensive to protect the species if used as a basis for exclusion zones. However, it was not shown that they were useless or unreliable in identifying the existence of the species in a coupe at all. Thus, the evidence adduced by Warburton relating to nine coupes showed that DELWP had understated the number of Tree Geebungs in six of the nine coupes, but in each of those it found some examples of the species. The evidence showed that no DELWP survey had been conducted in Harley and Ben 10. However, there was other evidence (referred to by the judge in

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37 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177; [1981] HCA 39 (Gibbs CJ, Aickin, Wilson and Brennan JJ) ('*Adam P Brown*'); *Niemann v Electronic Industries Ltd* [1978] VicRp 44; [1978] VR 431, 442 (Murphy J); *BHP Petroleum Pty Ltd v Oil Basins* [1985] VicRp 72; [1985] VR 756, 758 (Fullagar J); *Australian Dairy Corporation v Murray Goulburn Cooperative Co Ltd* [1990] VicRp 33; [1990] VR 355, 364–5 (McGarvie J) and 380 (Marks J).

38 *Adam P Brown* (1981) 148 CLR 170, 177; [1981] HCA 39 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

his ruling of 23 September 2020) that VicForests had done pre-harvest surveys and located a number of trees in Ben 10 and no trees in the relevant portion of Harley.

115 The evidence before the judge, and the evidence to which we were taken, did not show that the conclusion reached by the judge, as reflected in his orders, was not open on the evidence.

116 We are not persuaded that the judge ignored or failed to take into account evidence that was relied on by each party. The judge was not obliged to refer to all of the evidence in his reasons. Having read each of his Honour's rulings, we are satisfied that he had a proper understanding of the issues and of the limitations that were associated with the pre-harvest surveys conducted by DELWP and VicForests, and that his Honour acted on the basis of the evidence. It was not established before the judge, nor in this Court, that the mechanism contained in the order did not accurately reflect his Honour's intention. Nor was it established that the judge ignored relevant matters or arrived at a result that was plainly unjust.

117 We would reject ground 3.

Ground 1: failure to consider amended summons

118 Ground 1 contends that the judge erred in failing to deal with the amendments made by the proposed amended summons which had been emailed to the judge's chambers on 12 October 2020.

119 This ground was not developed in oral argument. There is nothing in the point because the critical relief sought by Warburton was already contained in the 5 October summons. The judge dealt with those matters.

120 We do not accept there was any failure by the judge to consider how the exclusion zones should be marked or the extent to which the obligations imposed by the injunction should be imposed on VicForests directly. This was the subject of order 2 in the amended summons. The judge was not under any misunderstanding

about the nature of the injunctions sought and he explained the form of order that he made. Furthermore, there was no injustice that would warrant interference by this Court.

121 Ground 1 must be rejected.

Conclusion on Warburton's application

122 Warburton's application for leave to appeal must be refused.

123 By application made on 22 April 2021, Warburton applied to this Court for an injunction substantially in the form that it had sought from Garde J. As there was no appellable error in the decision of Garde J to grant the injunction in the form that he did, it would be inappropriate for this Court to entertain that application. No error having been established, it is not the role of this Court to consider for itself what, if any, injunction should be granted pending trial. That issue is a matter for the trial division. Accordingly, the application to this Court for an injunction must be refused.

VicForests' application on standing

124 In its defence to the original statement of claim, which concerned the single coupe, Pat's Corner, VicForests admitted that Warburton had standing to bring the proceeding. Subsequently, when Warburton expanded its claim so as to cover the Central Highlands, VicForests sought to reverse its position and contend that Warburton does not have standing. Procedurally, it wishes to contend that Warburton does not have standing to bring its claim in respect of any area beyond Pat's Corner, and by extension, will seek leave to withdraw its admission in relation to that coupe.

125 The question of standing has been agitated in this proceeding on a number of occasions but has not yet been finally determined. In *Warburton Environment (No 2)*, the judge set out the principles that he proposed to apply in relation to the

determination of standing.[39]

126 Subsequently, in written submissions the parties addressed that issue and the matter was the subject of oral argument on 15 October and 8 December 2020. In his reasons, the judge observed that the determination of standing in advance of the trial would be in substance the determination of a preliminary or separate question under r 47.04 of the *Supreme Court (General Civil Procedure) Rules*.[40] His Honour noted the caution which is required to be exercised before a judge determines a separable or preliminary question under that rule.[41]

127 The judge identified the following matters as militating against the determination of standing as a preliminary or separate issue before trial:

(a) the statement of claim and prayer for relief have been amended or sought to be amended on several occasions. It cannot be assumed that the statement of claim will remain in its current form or that the relief presently sought will be the relief ultimately sought;

(b) the pleadings are yet to close, and no defence has been filed to the PASOC;

(c) there are or are potentially contested issues of fact relating to standing;

(d) Warburton's case relies on affidavits filed with the Court. VicForests is yet to have the benefit of discovery as to matters of standing, or the opportunity to cross-examine deponents;

(e) while determination of the standing issue in favour of VicForests will conclude the proceeding, determination of the standing issue in favour of Warburton is only a step towards success in the proceeding. The need for trial on all other issues would still remain;

(f) the Court has not had the opportunity to form an impression as to the strength of the witnesses' evidence as to standing; and

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39 *Warburton (No 2)* [2020] VSC 738, [39]–[44].

40 Reasons [13].

41 *Hoh v Ying Mui Pty Ltd* [2019] VSCA 203, [393] (Beach JA, Hargreave JA and Sifris AJA), quoting *Murphy v State of Victoria* (2014) 45 VR 119, 126 [28]; [2014] VSCA 238; (Nettle AP, Santamaria and Beach JJA)('*Murphy*').

(g) there will not be any significant saving of time or cost if standing is determined ahead of trial.[42]

128 The judge therefore concluded that it was not appropriate to finally determine standing at this stage of the proceeding. VicForests seeks leave to appeal that decision.

129 The decision as to when to hear an aspect of a proceeding and whether to hear a separate question is a matter of practice and procedure, which, as already observed, requires the applicant for leave to appeal to establish error and that substantial injustice is likely to be caused to the applicant if leave were refused.[43]

130 The authority to which the judge referred[44] highlights the caution which should always attend the separation of an issue for determination ahead of trial. Experience has shown that such a course often involves increased cost and delay.

131 In circumstances where VicForests has admitted standing in respect of one coupe, and where the judge was satisfied that the evidence established standing on a prima facie basis, there was much to commend the course taken by the judge. This Court would only interfere in matters of practice and procedure where the decision would result in significant injustice. VicForests has entirely failed to establish that injustice.

132 That differing views can be taken on the question of when standing should be determined is illustrated by the observations of the High Court in *Australian Conservation Foundation v The Commonwealth*[45] and *Onus v Alcoa of Australia Ltd*.[46] In *ACF*, Aickin J had, at first instance determined the question of standing as a

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42 Reasons [16].

43 *Adam P Brown* (1981) 148 CLR 170, 177; [1981] HCA 39 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

44 *Hoh v Ying Mui Pty Ltd* [2019] VSCA 203 (Beach, Hargreave JJA and Sifris AJA).

45 (1980) 146 CLR 493; [1980] HCA 53 (Gibbs, Stephen, Mason and Murphy JJ) ('*ACF*').

46 (1981) 149 CLR 27; [1981] HCA 50 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ) ('*Onus*').

preliminary issue on the pleadings. His decision to do so was the subject of an unsuccessful challenge in an appeal to the Full Court. Gibbs J agreed that in that case 'it was clearly more convenient' to deal with the issue of standing first.[47]

133 On the other hand, in *Onus*, where the question of standing had also been determined as a preliminary question in the Full Court of the Supreme Court, Gibbs CJ said that it was unfortunate that the issue had been determined that way, 'particularly on such scanty material'.[48] Gibbs CJ continued:

> The question whether a plaintiff has standing to bring an action is one that logically arises before the question whether he is entitled to succeed in the action. However, as I pointed out in *Robinson v. Western Australian Museum*, the court has a discretion whether or not it should determine the question whether the plaintiff has a sufficient interest to bring the proceedings before it proceeds to determine the merits of the case.[49]

134 We note that standing was determined as a preliminary question in *Kinglake v VicForests*.[50] That decision is subject to an application for leave to appeal which was heard at the same time and by the same bench as the present application. It may be that the outcome of that decision will influence whether standing remains an issue and, if so, whether it is appropriate to deal with it on a preliminary basis.

135 Certainly, as the matters stood before the judge, there was no error in not resolving the question of standing as a separate issue. Nor was there any injustice. That being so, VicForests' application for leave to appeal must be refused.

Conclusion

136 Both applications for leave to appeal should be refused.

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47 *ACF* (1980) 146 CLR 493, 533; [1980] HCA 53; see also 546 (Stephen J).

48 *Onus* (1980) 146 CLR 27, 38; [1980] HCA 53.

49 Ibid (citations omitted).

50 *Kinglake Friend of the Forest Inc. v VicForests (No 4)* [2021] VSC 70 (Richards J).