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R U L I N G

HIS HONOUR:

Introduction

On 12 August 2021, I made rulings limiting further discovery by VicForests to six categories of documents, and limiting contractor subpoenas to two categories of documents. The two categories for the subpoenas are analogous to the fifth and sixth categories of documents to be discovered by VicForests, as settled by the Court. They are relevant to six contractors. Other contractor subpoenas were to be set aside.

The ruling as to contractor subpoenas was given on the basis that there was no reason why contractors should be required to produce documents of a category not required to be produced by VicForests.

I have been informed that a number of contractors have already produced documents in response to the subpoenas. The issue arises as to how the documents produced by the contractors are to be treated.

In remarks made on 12 August 2021, I highlighted the need for a practical solution to the processing of the contractor documents. There might be a need to redact some documents. My aim was to minimise the amount of work and time that would be required.

In making these remarks, I sought to give effect to the overarching purpose found in s 7 of the *Civil Procedure Act 2010* (Vic), to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. What is needed is a simple, cost-

1 effective and efficient process to separate the relevant
2 documents, or parts of documents, from those which are
3 irrelevant.

4 **Access to documents**

5 Under r 42.09(3) of the *Supreme Court (General Civil*
6 *Procedure) Rules 2015* (Vic) ('Rules'), access to
7 documents produced to the Court under r 42.06(4)(b) of
8 the Rules is not permitted unless leave of the Court is
9 obtained, and the inspection is in accordance with that
10 leave. The grant and extent of access, and the way in
11 which access is to be made, are matters to be determined
12 by the Court.

13 **Submissions**

14 The parties have suggested different ways in which
15 access should be allowed. Warburton Environment submits
16 two alternatives. In brief, the first is to allow access
17 to the contractor documents on an implied *Harman*
18 undertaking. The second is to release unredacted
19 documents to both parties' legal practitioners, who will
20 then need to reach agreement as to the material that is
21 to be redacted. In the event that agreement is not
22 reached, the Court would need to determine the relevance
23 of documents.

24 VicForests submits that its solicitor should have
25 access to the contractor's documents, redact those that
26 need to be redacted, and provide the documents or
27 redacted documents which fall into the two relevant
28 categories to Warburton Environment's solicitors.

29 **Wider context**

30 The process to be undertaken in relation to the
31 contractors' documents needs to be seen in a wider

1 context. VicForests has already provided large numbers
2 of documents by way of discovery to Warburton
3 Environment. Substantial additional discovery is to be
4 made as to six categories of documents as a result of the
5 order of 13 August 2021. The two categories of
6 contractors' documents concerning Tree Geebung are likely
7 to generate a much smaller number of documents than those
8 to be produced by VicForests. It is to be expected that
9 many of the documents concerning Tree Geebung held be
10 contractors will have been received from VicForests, or
11 sent by contractors to VicForests. They will be produced
12 by VicForests anyway.

13 The only additional discoverable documents likely to
14 be found in the contractors' documents and not separately
15 produced by VicForests will be documents concerning Tree
16 Geebung independently raised by contractors and not
17 provided to VicForests, or documents concerning Tree
18 Geebung obtained by the contractors from other sources.
19 There will be many irrelevant documents. Having regard
20 to the issues in this case, and the importance of expert
21 evidence, it is unlikely that the documents to be
22 produced by the contractors will have much significance
23 at the trial of the proceeding.

24 **The process to be adopted**

25 As I have said, what is needed is a simple process
26 to separate the relevant documents from the irrelevant
27 ones. The process should be just, efficient, timely and
28 cost-effective.

29 Discovery is a standard procedure in civil
30 litigation. It is undertaken by the party making
31 discovery with the assistance of legal advisors. Unless

1 there is an objection, it is not a process that involves
2 the opposing party, who is the recipient of the documents
3 to be produced.

4 In order to identify documents to be discovered
5 under the six categories of documents to be produced by
6 VicForests, its solicitors are, I expect, already
7 searching through documents. They will have developed
8 search techniques and be proficient in identifying
9 documents within the categories that need to be
10 discovered. It is appropriate and convenient if they
11 continue this work by reviewing the contractors'
12 documents. It is fair and efficient that the procedure to
13 be adopted in relation to VicForests' own documents
14 extend to the contractors' documents. Given the tight
15 timetable before trial, it is necessary that document
16 production and inspection be completed promptly.

17 Compulsory production of documents by subpoena is an
18 intrusive process affecting third party rights. Third
19 parties must produce the documents subpoenaed, or be in
20 contempt of court. The Court should be alert to minimise
21 the impact on third party rights. Where documents
22 produced on subpoena are found to be irrelevant, they
23 should be returned to the third party or destroyed as
24 soon as possible. To do otherwise would infringe the
25 rights of third parties to maintain privacy and the
26 confidentiality of their records.

27 It is not appropriate to leave relevancy or the
28 redactions to be made to discussions between legal
29 advisors. As the need for this ruling illustrates, there
30 may be difficulties in resolving matters of detail, even
31 if not ultimately important, and considerable costs and

1 delay incurred. It is not in the interests of justice or
2 those of the parties that this be permitted.

3 This does not mean that Warburton Environment is
4 without rights. It is, and will be, in exactly the same
5 position as a party receiving discovery from an opposing
6 party. It can object to what is done for the same reasons
7 as exist in relation to discovery in any other
8 proceeding.

9 **Conclusion**

10 For these reasons, I prefer and will make orders
11 generally in the form proposed by VicForests, with some
12 changes. Orders will be published accordingly.

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