

# DEFENDING VICTORIA'S FORESTS

## Taking it to the courts — 2003

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The Department of Primary Industries (DPI) has brought many criminal charges against civilians for entering publicly owned state forest. The prosecution provisions come from multiple pieces of legislation. Civilians engaging in direct action, usually referred to as 'protesters', form the bulk of those charged. However, in 2003 charges were also brought against a reporter and a miner. These prosecutions give rise to political and legal concerns.

### The criminal provisions

Prosecutions are brought under the *Summary Offences Act 1966* (Vic), the *Forests Act 1958* (Vic), the *Land Act 1958* (Vic) and the *Conservation, Forests and Lands Act 1987* (Vic).

Commonly, but not always, the elements alleged to constitute each of the offences depend on the temporary closure of an area of state forest, expressed in a document in the following terms:

Pursuant to the power under section 18 of the *Forests Act 1958* [which gives a very general power to the Secretary to the Department of Sustainability and Environment to protect ... and have the control and management of ... State forests] to manage and control State forests and industrial undertakings carried out under the Act, delegated ... by the Secretary under section 11(2) of the *Conservation, Forests and Lands Act 1987* ... any licence, permission or authority of members of the public to enter or remain in the area of State forests [are withdrawn].

The applicable area of state forest (the exclusion area) and the period of exclusion are set out in such a document. All authorised officers, employed by the Department of Sustainability and Environment (DSE) and appointed for the purposes of the *Forests Act* and the *Land Act*, are then instructed to implement the withdrawal of permission to be in that area of forest.

Section 9(1)(d) of the *Summary Offences Act* is a prosecution provision often used by the DPI. It prohibits wilful trespassing in a public place.<sup>1</sup>

Public place includes, relevantly:

(b) any park garden reserve or other place of public recreation or resort;

(n) any place of public resort;

(o) any open place to which the public whether upon or without payment for admittance have or are permitted to have access.

A 'Scheduled public place' does not refer to state forests. It is accepted that a state forest is a 'public place'.

### Trespass

Proof of the commission of a trespass offence depends on whether:

- the Secretary was the owner or occupier of the relevant area for the purposes of s 9(1)(d) of the *Summary Offences Act*
- the defendant's entitlement to be in the relevant area was in law effectively defeated by the withdrawal of permission to be in that area of forest. (This raises the issue whether the withdrawal of permission was beyond the general power conferred on the Secretary by s 18 of the *Forests Act*.)

It may be that there is no such power to declare exclusion areas in state forest, although it has not been tested in the courts. The argument is based on the specific but limited powers elsewhere in the *Forests Act*, such as ss 21(1)(ea), 21(1A) and 99(15), suggesting s 18 confers no specific power for the closure of areas of state forest. It would follow that any attempt to exclude a person from state forest in this way is unlawful.

### Criminal offences under the Forests Act

Section 96 of the *Forests Act* creates 17 criminal offences. Section 96(f) is the most relevant provision to this article, making it an offence to 'refuse or fail to comply with any lawful direction of an authorised officer'.<sup>2</sup>

The particulars usually alleged by the prosecution are that the defendant refused to comply with a lawful direction of an authorised officer in the execution of their duty. Proof of the commission of the refusal depends on:

- whether there was a direction by the authorised officer to the person to leave the relevant area; and
- the lawfulness of any such direction which itself raises the issue whether the withdrawal of the permission was valid.

### Obstruction of an 'authorised officer'

A provision of the *Land Act* is most often relied on where the particulars allege the defendant obstructed an authorised officer in the execution of their duty.<sup>3</sup>

Proof of the commission of the obstruction offence depends on:

- whether the authorised officer was engaged in a (lawful) duty of preventing (unlawful) 'intrusion, encroachment or trespass on any such lands' in

### REFERENCES

1. Section 9 provides:

9. Wilful destruction, damage etc. of property

(1) Any person who ...

(d) wilfully trespasses in any public place other than a Scheduled public place and neglects or refuses to leave that place after being warned to do so by the owner occupier or a person authorized by or on behalf of the owner or occupier;

shall be guilty of an offence.

Penalty: 25 penalty units or imprisonment for six months.

2. Section 96 provides:

96. Offences

Every person who commits or attempts to commit or aids or abets any person who commits or attempts to commit any of the following offences shall be liable to imprisonment for a term of not more than one year or to a penalty of not more than 50 penalty units, or to both such imprisonment and penalty ...

(f) exercises compulsion upon any authorised officer by violence or threats or corrupts or attempts to corrupt by promises offers gifts or presents any authorised officer for the purpose of obtaining a favourable report recommendation certificate valuation or royalty assessment whether in respect of any place employment sale auction lease licence permit authority or any other benefit whatsoever, or for the purpose of obtaining abstinence on the part of any authorised officer from any act which forms part of his duties or refuses or fails to comply with any lawful direction of an authorised officer or assaults or obstructs any authorised officer in the execution of his duty. [emphasis added]

3. The relevant provision is:

31. Duties of bailiffs

(1) Every authorised officer shall —

(a) prevent intrusion encroachment or trespass on any such lands; ...

(2) An authorised officer shall have the like power and authority to do all such acts as any authorised officer lawfully appointed may by law do in respect of any lands tenements or hereditaments of his employer; and every such authorised officer may file a charge against any person who is in unauthorized occupation whether under colour of any licence or lease or otherwise of any Crown lands, or whose right to occupy such lands has ceased, and may sue for and recover any penalty from any person liable to forfeit the same.



(3) Any person who obstructs or assaults or incites or encourages any person to obstruct resist or assault an authorised officer in the execution of his duty under this Act or who threatens or abuses any such authorised officer shall be guilty of an offence against this Act.

Penalty: \$250 or imprisonment for three months.

4. *Code of Forest Practices for Timber Production, Revision No. 2, November 1996.*

connection with their dealings with the defendant, which itself raises two issues

- whether the withdrawal of permission for the defendant to be in the area was valid
- even if the withdrawal of permission was valid, whether the actions of the defendant fall within the words 'intrusion, encroachment or trespass'
- whether the simple failure to leave the area was, without more, capable of characterisation as 'obstruction' within s 31(3).

### Obstruction of 'forest operations'

The provision relied on in the *Conservation, Forests and Lands Act* again requires the prosecution to prove obstruction and reads:

95A. Hindering or obstructing forest operations

(1) A person must not hinder or obstruct —

- (a) another person in the lawful carrying out of forest operations; or
- (b) the lawful carrying out of forest operations.

Penalty: 20 penalty units.

(2) In this section 'forest operations' means —

- (a) the taking of forest produce from Crown land; or
- (b) activities taking place on Crown land and associated with that taking.

(3) In this section, 'Crown land' includes freehold land, managed land and vested land within the meaning of the Victorian Plantations Corporation Act 1993.

A defendant is usually charged with all of the above offences in relation to any one act, as it is the nature of the prosecution to file alternative charges. The way these matters usually run is that the defence will only enter a plea of guilty to one charge because of the duplicitous nature of the particulars. The prosecution then withdraws the remaining charges. In 2003, the

prosecution persisted with charges in the Wombat State Forest near Daylesford and in Goolengook in East Gippsland, despite the fact that the Government had announced a moratorium on logging in both regions before the charges were filed with the court.

### The lawfulness of logging

Many people enter logging coupes out of desperation; fuelled by a belief that forest operations in some areas continue, despite it being ecologically inept or unsustainable, and despite exhaustive efforts to communicate concerns to government. Most people who hold this belief and are criminally charged enter pleas of guilty and receive modest penalties from the court. However, a number of cases have called into question the lawfulness of the forest operation, as one case did in 2003. It was contended by the defendant that the logging operation was unlawful and, accordingly, the charges must be dismissed. The outcome of the hearing brings into question whether forest operations are only governed by 'goals and guidelines' that are not strictly applied.

Angela Taylor-Halpin was charged with wilful trespass (s 9(1)(d), *Summary Offences Act*), two counts of failing or refusing to comply with a lawful direction of an authorised officer (s 96(f), *Forests Act*), one count of hindering or obstructing the lawful carrying out of forest operations (s 95A(1)(b), *Conservation, Forests and Lands Act*), three counts of hindering or obstructing another person in the lawful carrying out of forest operations (s 95A(1)(a), *Conservation, Forests and Lands Act*) and obstructing an authorised officer in the execution of his duty (s 31(3), *Land Act*). The incident occurred in the Wilson–Sardine Corner coupe in the Wombat State Forest on 3 April 2002. Ms Taylor-Halpin was simply present in a logging coupe and refused to leave when asked to do so by an authorised officer.

The plea of not guilty, heard at Kyneton Magistrates Court, was based on a legal dispute as to the lawfulness of the forest operation and, in particular, whether stream types were correctly classified and protected in accordance with the Code of Forest Practices ('the Code')<sup>4</sup> which is supposed to dictate the minimum standards to be adhered to by workers in carrying out their logging activities. The prosecution contended the Code was correctly applied. It led evidence from the coupe supervisor who marked the coupe, the planner who assisted with the implementation of the harvesting operation and the scientist whose role is to ensure consistent application of the Code across the state. All

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of these prosecution witnesses were employees of the Department of Sustainability and Environment (which at the time of the incident was called the Department of Natural Resources and Environment, and was the same department that brought this prosecution). After the evidence of the supervisor, it was accepted by the prosecution that the coupe map did not reflect what was in fact marked on the ground. The map, however, carries with it a disclaimer, which reads:

The location and boundaries of the coupe as marked on this plan are only approximate and are merely indicative. The precise boundary of the coupe will be marked on the ground by the secretary before harvesting begins in accordance with the wood utilisation procedures.

The magistrate relied on this disclaimer, and only turned her mind to the markings on the ground. The real issue arose when the supervisor and the scientist gave evidence relating to the interpretation of the Code.

Section 2.3.3 defines four classes of stream types, which 'must' be afforded varying degrees of protection. The classifications are:

Class 1: Rivers and streams having a variable catchment area, but which flow on average greater than 90% of the year (*Permanent Streams*).

Class 2: *Temporary streams* that display a defined stream-bed, obvious incision and distinctive riparian vegetation, and carry water at wetter times of the year.

Class 3: *Drainage lines* with evidence of the action of periodically flowing water and/or a channel of more than 30 cm depth with clearly defined bed and banks carrying water only during, or immediately after periods of heavy rainfall. Riparian vegetation may or may not be present.

Class 4: Permanent spring, swampy ground, *wetlands* or other bodies of standing water.

The prosecution witnesses gave evidence that class 3, the drainage line, was only afforded protection if there was a channel of more than 30 cm depth. The word 'or' and the effect it had on the classification was completely disregarded. Evidence further revealed this was consistent with coupe marking across the state.

The defence led evidence from an Associate Professor at the University of Melbourne (an independent witness who had no association with the prosecuting department), currently positioned in the School of Anthropology, Geography and Environmental Studies, specialising in fluvial geomorphology (generally, the study of water courses). Evidence was also led from a forestry officer who had worked independently with the DSE. They gave evidence that the correct interpretation

of the Code did not require drainage lines to have a channel of more than 30 cm depth. Their evidence went on to explain there were in fact drainage lines with a channel of more than 30 cm depth that were afforded no protection anyway, so even if the incorrect interpretation of the Code was accepted by the court, there was still non-compliance with the Code.

The defence argued this non-compliance rendered the operation unlawful based on the conditions of the licence to log. Section 57 of the *Forests Act* reads:

#### 57. Restriction of rights of lessees and licensees

The holder of a lease or licence of or grantee of a permit with respect to any land under this Act or any corresponding previous enactment shall not fell cut destroy injure or remove any tree or timber on such land unless expressly authorized by his lease licence or permit so to do and then *only in accordance with such authorization*. [emphasis added]

It is a condition of the licence that the licence holder (that is, the worker carrying out logging activities) comply with the Code, as provided by regulation 10 of the *Forest (Licenses and Produce) Regulations 1999* (Vic), which reads:

#### 10. Licence holder to comply with Code of Forest Practices

It is a term and condition of a licence to cut and take away forest produce that the licence holder must comply with the requirements of the Code of Practice approved under the Conservation, Forests and Lands Act 1987 and called the Code of Forest Practices for Timber Production, Revision No. 2, November 1996.

The defence went on to argue that the Code has been ratified by both houses of parliament,<sup>5</sup> pursuant to s 55 of the *Conservation, Forests and Lands Act*, and so it is incorporated by reference into that Act.<sup>6</sup>

The defence contended the Code has statutory authority, so any breach of the Code is the equivalent of a breach of statute.

In this case, the court, when handing down its decision on 10 November 2003, was satisfied with the prosecution evidence that the stream type in question did not have a channel of more than 30 cm depth at the time the coupe was marked and ruled that compliance with the Code was a matter of opinion. The magistrate went on to say that the Code sets out 'goals and guidelines' only and that she was not referred to any section that incorporates or adopts the Code under any relevant law or regulation. Ratification is not enough. It was decided that even though compliance with the Code was a condition of the relevant licence, it did not

5. This is expressly stated on page 1 of the Code.

6. The relevant provision is:

#### 55. Compliance with Codes of Practice

(1) Compliance with a Code of Practice is not required unless the Code of Practice is incorporated in or adopted by —

- (a) a relevant law; or
- (b) a regulation made under an Act administered by the Minister; or

(c) a condition specified in an authority given under a relevant law and unless the instrument approving the Code of Practice has been ratified by a resolution passed by the Legislative Assembly and the Legislative Council.

(2) A resolution ratifying an instrument of approval of a Code of Practice may amend the Code of Practice and, if it does so, the instrument approving the Code of Practice is deemed to relate to the Code as so amended.

elevate the Code to the status of legislation, and in any case, the licensees complied with the marking on the ground. The court found the relevant charge was the charge of hindering or obstructing the lawful carrying out of forest operations (s 95A(1)(b), *Conservation, Forests and Lands Act*) and, after hearing submissions, sentenced Ms Taylor-Halpin to an adjourned undertaking to be of good behaviour and ordered her to pay \$100 into the court fund, without conviction.

This decision is pending appeal by the defendant. However, if it is upheld in the County Court, the decision raises grave concern that the logging of forests in Victoria is subject only to goals and guidelines that are not strictly adhered to. In practice, such an approach is allowing logging to take place in an ecologically unsustainable way. The result in this case demands the Government take steps to rectify the inadequacy so that compliance with the Code is always seen as paramount to the lawfulness of the operation.

### The 'reporting' of logging no defence

It is a myth that these prosecutions are only brought against protesters, as one defendant discovered when charged whilst attempting to report from Goolengook. The prosecution appears trivial, politically motivated, and aimed to repel the media from reporting at the scene.

Peter Vaughan was charged with littering (s 5(1), *Litter Act 1987* (Vic)), failing to remove litter when asked to do so by an authorised officer (s 19(1), *Litter Act*), assaulting an authorised officer in the execution of his duty (s 31(3), *Land Act*), obstructing a road by standing on it (s 4(e), *Summary Offences Act*), failing or refusing to comply with a lawful direction of an authorised officer being a direction to leave the area (s 96(f), *Forests Act*), obstructing an authorised officer in the execution of his duty (s 31(3), *Land Act*), and unlawful assault (s 23, *Summary Offences Act*) in state forest near Orbost on 10 March 2002. On the evidence, Mr Vaughan was filming from Goolengook Road outside any declared area of exclusion at the time he was charged. He was making a documentary about the struggles to save Goolengook from continued logging.

The plea of not guilty was predominantly based on factual dispute. Section 5(1) of the *Litter Act* provides:

5. Deposit of litter generally

(1) A person must not deposit any litter unless —

...

(d) the deposit of the litter is an unavoidable consequence of a lawful activity; or

(2) For the purposes of sub-section (1)(d), a consequence is unavoidable if there is no reasonably practicable way of avoiding it.

Penalty: 20 penalty units.

Evidence revealed that the 'litter' was in fact a piece of paper held over Mr Vaughan's camera lens by the authorised officer referred to in the particulars. Mr Vaughan moved the piece of paper away from his lens and it fell to the ground. This set of facts should have caused the dismissal of this charge, in the least by relying on s 5(1)(d) of the *Litter Act*. Section 19(1) of the *Litter Act* provides that '[a] person must remove any litter deposited by that person if asked to do so by an authorised officer'.

The authorised officer in fact owned the piece of 'litter'. Evidence revealed it was a document of some importance to the authorised officer. It is feasible to expect the authorised officer would have retrieved his document. This set of facts can only be seen as a trivial prosecution and a frivolous application of statute.

The reliance on s 4(e) of the *Summary Offences Act* appears to have been abused in the same way. It provides that '[a]ny person who, to the annoyance of any person ... obstructs a footpath or road whether by allowing a vehicle to remain across such footpath or road or by placing goods thereon or otherwise, shall be guilty of an offence'.

The evidence of this case shows Mr Vaughan did not allow any vehicle or goods to remain across the road. The section title even seems inconsistent with the facts.

The prosecution conceded s 31(3) of the *Land Act* and s 23 of the *Summary Offences Act* were brought in the alternative. Section 31(3) has been extracted above at footnote 3. Section 23 of the *Summary Offences Act* provides that '[a]ny person who unlawfully assaults or beats another person shall be guilty of an offence'.

The prosecution sought to satisfy the elements of this offence by alleging Mr Vaughan pushed the authorised officer in the chest with sufficient force to cause him discomfort and make him feel apprehensive. Mr Vaughan's video of the incident was played in court. It cast doubt over this allegation. After that, the prosecution withdrew all charges against Mr Vaughan on 13 January 2004. This occurred on the second day of the hearing (the first hearing in August 2003 was aborted before its completion) on the condition the defence sought no order as to costs.

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Mr Vaughan may have been encouraged to agree to the withdrawal since the court may have found the obstruction or refusal offence was proven. Reporting is not a defence to a criminal charge and the Government did not see reporting as a reason to resist criminal prosecution. Reporting did play a key role in putting a halt to the logging of Goolengook. The media reporting must have assisted public awareness of the nature of the operation. The Government announced the halt to logging because '[T]he old growth in the Goolengook Forest has become an area of particular significance to the Victorian public ...'<sup>7</sup> The decision to prosecute Mr Vaughan appears inconsistent with the Government's reason for halting logging at Goolengook.

### The miner's right

The DPI brought charges against a genuine prospector when he was fossicking in a popular mine site whilst it was subject to a logging operation. The defence raised a legal dispute as to two sets of rights outlined in mining and logging legislation.

Mr Nic Dubic-Timson was charged with obstructing an authorised officer (s 95A(1)(a), *Conservation, Forests and Lands Act*), obstructing a forest operation (s 95A(1)(b), *Conservation, Forests and Lands Act*), refusing to comply with an authorised officer (s 96(f), *Forests Act*) and obstructing an authorised officer (s 31(3), *Land Act*) in the Wombat State Forest on 23 May 2002. On the evidence, Mr Dubic-Timson produced his Miner's Right while he was fossicking in the Specimen Hill Dam Coupe near Daylesford when approached by the authorised officer. This did not deter the DPI from prosecuting him.

The matter was heard over three hours at the Broadmeadows Magistrates Court on 4 December 2003. Counsel for the defendant argued that the Miner's Right provided him with a number of rights giving rise to complete defences to the charges. This Miner's Right is granted under regulations authorised by the *Mineral Resources Development Act 1990* (Vic).<sup>8</sup>

The defendant was exercising his right on Crown Land. Sections 6 and 7 of the *Mineral Resources Development Act* do not provide that permits should not be exercised in areas subject to logging operations. This is not surprising as mining being an extraction exercise is sui generis with logging. Both assume something below premium conservation importance. One is not necessarily inconsistent with the other. Indeed mining is conceivably of greater economic importance.

The defence further argued that parliament did not expressly anticipate the holder of a Miner's Right might

be excluded from his rights in a logging coupe. There is nothing in the language of the Acts governing logging to evince any intention to diminish the Miner's Right to the extent necessary to preserve the logging right or displace the Miner's Right. The Acts governing logging should not, in the absence of any provision expressly relating to the *Mineral Resources Development Act*, be construed as derogating from, repealing or altering the provisions contained in that Act.

Finally, the defence contended that the logging penal provisions are in the nature of the offence of trespass or being unlawfully on premises. Both offences, as with the offences charged, do not require damage or intent to do anything further. It is the nature of such offences to have defences of lawful purpose (usually expressed in the statute), being 'lawfully' on the land and absence of *mens rea*, that is, not intending to be somewhere without permission or claim of right. These defences were applicable to the defendant.

The court handed down its decision on 2 February 2004, essentially conceding to submissions on behalf of the defendant. All charges were dismissed and the DPI was ordered to pay the defendant's costs. Parliament should now amend the legislation to overcome what the defence rightly argued is conflicting legislation.

### Effective forests defence

The matters heard before the court in 2003 have had a great effect, both politically and legally. There are outstanding issues, such as whether the DPI should persist with certain prosecutions when the government has halted logging in the relevant areas. Ecological trepidation became a live issue with the identification of deficiencies in the application of the Code that governs logging. Whether the media has the right to enter logging coupes to report on issues of public interest remains unresolved. Legal rights associated with mining and those associated with logging were identified to be in clear conflict with each other. The courts have interpreted the law. It now remains to be seen if parliament will take any action.

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7. Quoting the then Environment Minister Sherryl Garbutt, Melissa Fyfe 'Logging in Goolengook to be Halted', *The Age* (Melbourne), 30 October 2002.

8. The relevant provision is:

55. Miner's right

(1) A miner's right entitles the holder to search for minerals on any of the following land, unless the land is covered by a mining licence-

(a) private land, but only with the consent of the owner or occupier; and

(b) Crown land (other than land exempted under section 6 or 7 of this Act or nominated under section 7(1) of the Crown Land (Reserves) Act 1978).