

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

and

VICFORESTS

No. of 2009

Plaintiff


Defendant

AFFIDAVIT OF VANESSA ELIZABETH BLEYER

Date of document:	24 August 2009	
Filed on behalf of:	Plaintiff	
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I, VANESSA ELIZABETH BLEYER, Solicitor, of Level 1, 550 Lonsdale Street, Melbourne in the State of Victoria make oath and say as follows:

1. I am the Principal of the law practice Bleyer Lawyers Pty Ltd and have the care and conduct of this proceeding on behalf of the Plaintiff. I am authorised to make this Affidavit on behalf of the Plaintiff.
2. I make this Affidavit from my own personal knowledge save where otherwise stated, and in my professional capacity.
3. Logging of State forest in Victoria is governed by a number of Acts, but is predominantly administered under the *Sustainable Forests (Timber) Act* 2004 (Vic) ("the Timber Act"). The *Forests Act* 1958 (Vic) ("the Forests Act"), the *Conservation, Forests and Lands Act*


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1987 (Vic) ("**the Conservation Act**") and the *Flora and Fauna Guarantee Act* 1988 (Vic) ("**the FFG Act**") are also relevant to logging in State forest in Victoria.

4. The regulation of logging in State forest in East Gippsland in Victoria is set out in a diagram that is now produced and shown to me and marked "**VEB-1**".


VicForests

5. The Minister for Environment and Climate Change ("**the Minister**"), the Secretary of the Department of Sustainability & Environment ("**the Secretary**") and VicForests each play a role in the logging of State forest in Victoria.
6. VicForests is a State body under s 14 of the *State Owned Enterprises Act* 1992 (Vic). It was declared to be a State business corporation on 28 October 2003. Now produced and shown to me and marked "**VEB-2**" is a true copy of the order of the Governor in Council published in the Government Gazette establishing VicForests. Its principal function is to undertake, on a commercial basis, the sale and supply of timber resources in Victorian State forests.
7. The Victorian State government allocates timber in State forest to VicForests. Under s13(a) of the Timber Act, the Minister, by order published in the Government Gazette, may "*allocate timber in State forests to VicForests for the purpose of harvesting and selling, or harvesting or selling, timber resources*".

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The allocation order


8. On 29 July 2004, the Minister made an allocation order pursuant to s13 of the Timber Act. The allocation order allocates timber to VicForests by reference to numbers of different forest stands in forest management areas throughout Victoria. One such forest management area is the "East Gippsland" forest management area. Now produced and shown to me and marked "VEB-3" is a true copy of the 2004 allocation order.
9. On 21 March 2007, the allocation order was varied under s17 of the Timber Act. The variation only changed the volume of some of the forest stands allocated to VicForests. Now produced and shown to me and marked "VEB-4" is a true copy of the amendment.
10. Section 15(1)(c) of the Timber Act provides that an allocation order must include "*the conditions to which VicForests is subject in carrying out its functions under the allocation order, including any applicable performance measures and standards*".
11. The allocation order sets out a number of conditions that VicForests is required to comply with in "undertaking authorised activities", including complying with "the conditions and standards in the following documents as amended from time to time":
 - (a) The Code of Forest Practices for Timber Production, Revision No. 2, 1996. Department of Natural Resources and Environment;
 - (b) Management Guidelines as specified in Forest Management Plans published by the Department of Sustainability and Environment or its predecessors, relevant to the Forest Management Areas to which this Order applies; and
 - (c) The Management Procedures for Timber Harvesting and Associated Activities in State forests in Victoria, 2004. Department of Sustainability and Environment.

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12. The documents referred to at subparagraphs 11(a) to (c) inclusive above are referred to further below.


Timber release plan

13. After an allocation order is made, a timber release plan needs to be made. VicForests prepares it and submits it to the Secretary for approval. Section 37(1)(a) of the Timber Act provides that "VicForests must prepare a timber release plan in respect of an area to which an allocation order applies for the purposes of harvesting and selling, or harvesting or selling, timber resources". The purpose of a timber release plan is to more specifically identify the timber resources in a particular area by reference to areas called 'coupes', how large each coupe is, what silvicultural techniques will be used to log them and (broadly, by periods of 2 years) when each coupe is scheduled to be logged.
14. Under s40 of the Timber Act, the Secretary may "approve a timber release plan if the Secretary is satisfied that the plan is not inconsistent with: (a) the allocation order to which it relates; and (b) any Code of Practice relating to timber harvesting".
15. Section 41(1) of the Timber Act requires the Secretary to "cause notice of the approval of a timber release plan to be published in the Government Gazette".
16. On 9 June 2009, the Secretary published notice of the approval of a timber release plan, which is the second timber release plan that has been approved under the Timber Act.
17. Now produced and shown to me and marked "VEB-5" is a true copy of the publication of approval. Now produced and shown to me and marked "VEB-6" is a true copy of the timber release plan ("the TRP"). Now produced and shown to me and marked "VEB-7" is

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a true copy of the list of coupes attached to the timber release plan that can be logged in East Gippsland.

18. Now produced and shown to me and marked "VEB-8" is a true copy of the map attached to the timber release plan that includes all of the coupes currently available for logging in East Gippsland. Now produced and shown to me and marked "VEB-9" is a true copy of the same map which focuses on four coupes which carry coupe ID numbers 840-502-0015, 840-502-0019, 840-502-0026 and 840-502-0027. The map marked "VEB-8" has a black circle on it which indicates the area that comprises the map marked "VEB-9".
19. In conducting logging, Vicforests must do so:
 - (a) "in accordance with any approved timber release plan" (s44 of the Timber Act)' and
 - (b) In compliance with "any relevant Code of Practice" (s46 of the Timber Act).
20. The TRP provides that its objectives are to:
 - (a) "Provide a schedule of coupes selected for clearfell harvesting, seed tree harvesting, thinning from below and coupe access roads... associated with new coupes and road line improvement in East Gippsland...;
 - (b) "Provide a list of unharvested coupes and modified coupes which were previously included [in a now obsolete TRP]... which are carried over into [this TRP]...;
 - (c) "Provide a list of coupes which have been harvested but not yet meet regeneration requirements therefore can not be handed back to DSE [Department of Sustainability & Environment] for finalisation...;
 - (d) "Amend forest stand descriptions resulting from mapping discrepancies;

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- (e) "Identify unallocated forest stands within proposed coupe boundaries that are excluded from the TRP...",


(page 1 of the TRP).

21. The TRP also provides that, in accordance with s15(1)(c) of the Timber Act, "in undertaking authorised activities Vicforests is required to comply with the conditions and standards in the following documents as amended from time to time..." (page 3 of the TRP):

- (a) The Sustainability Charter for Victoria's State forests, 2006. Department of Sustainability and Environment;
- (b) The Code of Practice for Timber Production 2007. Department of Sustainability and Environment;
- (c) Management Guidelines as specified in Forest Management Plans published by the Department of Sustainability and Environment or its predecessors, relevant to the Forest Management Areas to which this change applies; and
- (d) The Management Procedures for Timber Harvesting and Associated Activities in Victoria's State Forests, 2007. Department of Sustainability and Environment.


The Code of Practice for Timber Production 2007

22. The Code of Forest Practices for Timber Production, Revision No. 2, 1996 referred to at paragraph 11(a) above was replaced by the Code of Forest Practice for Timber Production 2007 referred to at paragraph 21(b) above ("**the Code**"). Part 5 of the Conservation Act provides for the making of the Code by the Minister. Section 3 of the Timber Act defines

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the Code as being that made under the Conservation Act. Now produced and shown to me and marked "VEB-10" is a true copy of the Code.

23. The Code regulates in some detail the undertaking of specific timber harvesting and associated activities. Each specific timber harvesting operation must be conducted in accordance with an approved Forest Coupe Plan. Part 2.1.3 of the Code deals with Coupe Plans.
24. The Code:
 - (a) says that its purpose "is to provide direction and guidance to forest managers and operators to deliver sound environmental performance when undertaking commercial timber... harvesting operations in such a way that [among other things] is compatible with the conservation of the wide range of environmental... values" (page 5 of the Code);
 - (b) "applies to forest management planning and operations on land that is available for timber production" (page 5 of the Code); and
 - (c) includes "mandatory actions" which are "actions to be conducted in order to achieve each operational goal", where an operational goal "states the desired outcome or goal for each specific areas of timber production operations" (page 7 of the Code).
25. At p 7 the Code states that "*failure to undertake a mandatory action would result in non compliance with the Code*".
26. Operational goals relevantly include:
 - (a) The preparation of timber release plans (p 14)
 - (b) The preparation of Forest Coupe Plans (p 15)

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- (c) That planning, harvesting and silvicultural programs in native forest will specifically address the conservation of biodiversity (p 21).

27. Some of the mandatory actions which must be conducted in achieving these operational goals are:

- (a) that that timber release plan must “be consistent with this Code of Practice and with the relevant forest management plan” and “minimise impact on biodiversity...” (page 14 of the Code);
- (b) that forest coupe plans “must be prepared in accordance with this Code of Practice, the relevant Forest Management Plan and any other relevant prescriptions or procedures, prior to the commencement of a timber harvesting operation” and “exclusion areas must be protected from timber harvesting operations and associated activities in accordance with relevant *Flora and Fauna Guarantee Act* Action Statements, the relevant Forest Management Plan and relevant legislation” (page 15 to 16 of the Code); and
- (c) that “*to facilitate the protection of biodiversity values, the following matters must be addressed when developing and reviewing [coupe] plans and must be adhered to during operations*”:
 - i. “application of the precautionary principle to the conservation of biodiversity values, consistent with monitoring and research to improve understanding of the effects of forest management on forest ecology and conservation values;

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- ii. "consideration of the advice of relevant experts and relevant research in conservation biology and flora and fauna management at all stages of planning and operations;
 - iii. "use of wildlife corridors, comprising appropriate widths of retained forest, to facilitate animal movement between patches of forest of varying ages and stages of development, and contributing to a linked system of reserves; and
 - iv. "providing appropriate undisturbed buffer areas around significant habitats",
- (page 21 of the Code).

The East Gippsland Forest Management Plan


28. Forest management plans referred to in paragraphs 11(b) and 221(c) above are "working plans" required to be made by the Secretary in accordance with s22 of the Forests Act. There are a number of plans, effectively one for each forest management area in Victoria. The Secretary prepared and put into operation a forest management plan for the East Gippsland forest management area ("**East Gippsland FMP**"). Now produced and shown to me and marked "**VEB-11**" is a true copy of the East Gippsland FMP.

29. The East Gippsland FMP:

- (a) provides that the East Gippsland forest management area "covers 1.2 million ha in the far eastern corner of Victoria, approximately 320 km east of Melbourne... covered mostly by native forest... renown for its diversity of natural values...";

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- (b) says that its purpose is to “establish strategies for integrating the use of State forest for wood production and other purposes, with conservation of natural, aesthetic and cultural values across the whole [forest management area]”; and
30. Chapter 2 of the East Gippsland FMP is entitled “forest management strategy” and creates forest management zones. The zoning scheme divides State forest on East Gippsland into three zones (giving a descending hierarchy of protection from logging) as follows:
- (a) special protection zones (“SPZ”) that “will be managed for conservation” and from which “timber harvesting will be excluded”;
 - (b) special management zones (“SMZ”) that will be “managed to conserve specific features, while catering for timber production under certain conditions”; and
 - (c) general management zones (“GMZ”) that “will be managed for a range of uses, but timber production will have a high priority”,
- (part 2.3 of the East Gippsland FMP).
31. Chapter 3 of the East Gippsland FMP is titled “biodiversity conservation” wherein “conservation guidelines for key biological values in State forest” are established which “set minimum levels of protection to be provided by the SPZ, SMZ and conservation reserves” (part 3.1 of the East Gippsland FMP). For example:
- (a) “a precautionary approach of protecting areas of undisturbed forest as foraging habitat will be adopted” for the Spot-tail Quoll where the “aim will be to protect a network of areas within the likely home range of the animal recorded” and “the protected area may include conservation reserves [and] larger patches of SPZ”;

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- (b) "for each of the following occurrences, approximately 100 ha of suitable habitat will be included in the SPZ": "Greater Glider - <2 individuals per ha, >10 per km, or > 15 per hour of spotlighting" and "Yellow-bellied Glider - > 0.2 per ha, >5 per km, or >7 per hour of spotlighting;
- (c) "well documented sites that are particularly rich in mammal species will be included in the SPZ or SMZ wherever practicable"; and
- (d) "sites supporting rare or threatened crayfish species and forest extending approximately 100m from each bank of the watercourse, for 1 km upstream and 1 km downstream of those sites will be included in the SPZ".


(part 3.4 of the East Gippsland FMP).

32. My understanding of that part of the East Gippsland FMP referred to in para 31(b) above is that where either species of Glider is found in or above the densities referred to, the area in which they are found must be zoned as Special Protection, with 100 ha around the sites in which the gliders were found forming that Zone.

The Flora and Fauna Guarantee Act


33. The East Gippsland FMP is integrated with the FFG Act and says, relevantly that:

- (a) the East Gippsland FMP "*has been developed in accordance with the requirements of the Flora and Fauna Guarantee Act 1988 and associated action statements*" (part 1.2 of the East Gippsland FMP); and
- (b) "*While some threatened or sensitive fauna are conserved indirectly by conservation of their habitat, others require special attention. Of particular note are species that*

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depend on tree hollows for nesting, and some predators that have the additional requirement of large territories of old forest (Sooty, Masked and Powerful Owls). As the age structure of the forest moves to include more regrowth, the maintenance of a suitable network of forest habitat for these species becomes an important issue. 'Loss of hollow-bearing trees' is listed as a potentially threatening process under the Flora and Fauna Guarantee Act 1988. Other species, such as Long-footed Potoroo and Rough Eyebright (*Euphrasia scabra*), have their own management strategies or Flora and Fauna Guarantee Action Statements, which complement this Plan" (part 1.3 of the East Gippsland FMP).


34. Under s19 of the *Flora and Fauna Guarantee Act 1988* (Vic), the Secretary "must prepare an action statement for any listed taxon or community of flora or fauna... as soon as possible after that taxon... is listed".
35. The action statement for the Long-footed Potoroo was revised in 2009 ("the 2009 action statement"). The previous action statement was made in 1994 ("the 1994 action statement"). Now produced and shown to me and marked "VEB-12" is a true copy of the 1994 action statement. Now produced and shown to me and marked "VEB-13" is a true copy of the 2009 action statement.
36. The 1994 action statement provides that:
 - (a) it "*is one of the rarest mammals in Australia*" (page 1);
 - (b) "*Populations of Long-footed Potoroos in State forest are potentially threatened by habitat loss or fragmentation caused by logging and associated road construction*" (page 2); and

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- (c) *"Given the rarity of Long-footed Potoroos, and the lack of any information which suggests that they respond positively to fire or logging in the long term, areas supporting the species should be protected from fire and logging until more conclusive information is available"* (page 3).

37. The 2009 action statement provides that:

- (a) *"the species is... rare; it has been encountered at only about 120 sites despite intensive survey effort over 20 years, its known distribution is only of the order of 500,000 ha spread over three sub-populations, and there are historical indications that it was once more widespread"* (page 3);
- (b) *"The known sub-populations appear to be disjunct, and this increases the vulnerability of the species to several threatening processes, principally predation by introduced foxes but including habitat disturbance as a result of timber harvesting and fire"* (page 3);
- (c) *"The major threats probably or potentially operating on the Long-footed Potoroo are predation (especially by introduced species) and habitat destruction or degradation from timber harvesting and fire"* (page 3);
- (d) *"Conservation Objective: Long term objective: To ensure that the Long-footed Potoroo can survive, flourish and retain its potential for evolutionary development in the wild"* (page 7);
- (e) *"Each Long-footed Potoroo (LFP) detection site outside the Core Protected Area will generate a Special Management Zone (SMZ) of approximately 150 ha"* (page 13); and

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- (f) *"Within each SMZ, at least one third (~50 ha) will be protected from timber harvesting and new roading" (page 13).*


38. The action statement for the Spot-tailed Quoll provides that:

- (a) *"In considering any impact of logging on Spot-tailed Quolls, the amount of protected and retained habitat across the landscape is important" (page 4);*
- (b) *"a standard habitat protection prescription of a 500 ha Special Protection Zone (SPZ) and a 1000 ha Special Management Zone (SMZ) [must be implemented] for all confirmed Quoll records in State forest throughout Victoria, up to targets specified in individual" FMPs (page 8); and*
- (c) Site protection for Quolls *"will be prioritised according to habitat quality, current reservation status of the site, linkage to other reserves and the presence of complementary values" (page 8).*

Now produced and shown to me and marked "VEB-14" is a true copy of the action statement.

39. The action statement for the Orbost Spiny Crayfish provides that:

- (a) *"Timber harvesting, which occurs in several of the catchments inhabited by the crayfish, has the potential to affect detrimentally crayfish populations by altering the run-off and flow characteristics of the stream, the amounts of organic debris entering the stream, the temperature regimes, the amount and rate of sediment entering the stream, and by increasing primary productivity in the stream, with each factor liable to be more acute the closer the logging activity comes to the waterway" (page 2); and*


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- (b) *"Linear Reserves consisting of an undisturbed buffer of approximately 100m on each bank of the stream for one kilometre upstream and downstream of the detection site will be established at all sites on public land where Orbost Spiny Crayfish are recorded"* (page 4).

Now produced and shown to me and marked "VEB-15" is a true copy of the action statement.

40. The action statement for the Sooty owl provides that:

- (a) *"Sooty Owl Management Areas (SOMAs): Where clear-fell or seed-tree systems are used, each SOMA will comprise 500ha of forest to be managed as a Special Protection Zone (SPZ)";*
- (b) *"Sooty Owl Management Areas (SOMAs): Where selective harvesting is used, manage areas of approximately 1 000ha to maintain habitat capable of supporting adequate populations of terrestrial and arboreal prey mammals to support breeding owls. SOMAs based on specific records will comprise 3ha SPZs around the records plus SMZs of about 1 000ha which will allow for modified timber harvesting practices that retain sufficient levels of habitat trees. SOMAs based on habitat modelling will comprise solely the approximately 1 000ha SMZs. Special Management Zone Plans will be prepared specifying the prescriptions to be applied within SMZs for Sooty Owl and will become part of the relevant Regional prescriptions"; and*
- (c) *"All confirmed nesting and roosting sites utilised recently and frequently (based on reliable observation or physical evidence such as pellets or wash) located outside*

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SOMAs will be protected by a 3ha SPZ around the site and a 250-300m radius (or equivalent linear area) SMZ buffers around identified localities, unless they are already protected. In these cases, habitat for foraging is provided in areas excluded from timber harvesting by general prescription including wildlife corridors, steep areas and unmerchantable areas and areas protected for other management purposes”,

(page 5).

Now produced and shown to me and marked “VEB-16” is a true copy of the action statement.

The Sustainability Charter

41. The Sustainability Charter referred to at paragraph 21(a) above was created by the Minister. Now produced and shown to me and marked “VEB-17” is a true copy of the Charter.
42. Section 11(1) of the Timber Act provides that “the Minister may develop a Sustainability Charter”. Section 11(2) provides that the Charter must set out “objectives, consistent with the principles of ecologically sustainable development, for (a) the sustainability of forests; and (b) the sustainability of the timber harvesting industry”.
43. Under s12(a) of the Timber Act, “VicForests must develop initiatives and targets for those initiatives which respond to and support the objectives set out in the Charter”.
44. The Charter provides that the objectives set out in the Charter are consistent with “the principles of ecologically sustainable development” (page 2). The Timber Act defines

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"principles of ecologically sustainable development" as those set out in s5 of the Timber Act.


45. Section 5 of the Timber Act provides that:

- (1) In undertaking sustainable forest management in accordance with this Act, regard is to be had to the principles of ecologically sustainable development set out in this section.*
- (2) Ecologically sustainable development is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.*
- (3) The objectives of ecologically sustainable development are—*
 - (a) to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;*
 - (b) to provide for equity within and between generations;*
 - (c) to protect biological diversity and maintain essential ecological processes and life-support systems.*
- (4) The following are to be considered as guiding principles of ecologically sustainable development—*
 - (a) that decision making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations;*
 - (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
 - (c) the need to consider the global dimension of environmental impacts of actions and policies;*
 - (d) the need to develop a strong, growing and diversified economy which can enhance the capacity for environment protection;*
 - (e) the need to maintain and enhance international competitiveness in an environmentally sound manner;*
 - (f) the need to adopt cost effective and flexible policy instruments such as improved valuation, pricing and incentive mechanisms;*
 - (g) the need to facilitate community involvement in decisions and actions on issues that affect the community.*

46. The Charter provides that:

Through this Charter, the Department of Sustainability and Environment, the Department of Primary Industries and VicForests will manage Victoria's State forest in accordance with the following objectives:

- To maintain and conserve biodiversity in State forests*
- To maintain and improve the capacity of forest ecosystems to produce wood and nonwood products*
- To promote healthy forests by actively managing disturbance*

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- *To maintain and conserve the soil and water resources of State forests*
 - *To maintain and better understand the role of Victoria's State forests in global carbon cycles*
 - *To maintain and enhance the socio-economic benefits of State forests to Victorian communities*
 - *To ensure Victoria's legal, institutional and economic frameworks effectively support the sustainable management of State forests*
- (page 3.)

Sustainability Indicators

47. Section 6 of the Timber Act provides that *"The Minister must determine criteria and indicators for sustainable forest management"*. Now produced and shown to me and marked "VEB-18" is a true copy of the Criteria and Indicators produced under s6 of the Timber Act.

Management Procedures

48. The Management Procedures for Timber Harvesting and Associated Activities in State forests in Victoria, 2004 referred to at paragraph 11(c) above were ultimately replaced by the Management Procedures for Timber Harvesting and Associated Activities in Victoria's State Forests, 2007 referred to at paragraph 21(d) above. Now produced and shown to me and marked "VEB-19" is a true copy of the Management Procedures.
49. The Management Procedures provide that:
- (a) their objective is, among other things, to "form part of the regulatory framework for timber harvesting operations and associated activities" (page 2); and

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- (b) "In East Gippsland..., all living trees equal to or greater than 4m DBHOB [Diameter at Breast Height (1.3m) Over Bark]: i). must be protected from the direct effects of timber harvesting operations and regeneration burning; and ii). should not be isolated within the coupe. If possible they should be incorporated into retained habitat patches; and iii). should be included on the Gippsland Giant Tree Register maintained by DSE" (page 25).

Forest Coupe Plans

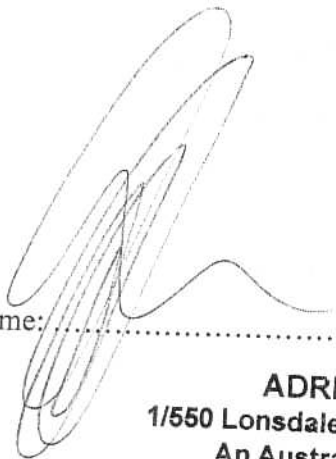
50. Forest Coupe Plans are not made publicly available by VicForests.
51. Accordingly, I am unable to exhibit the Coupe Plans for coupes 840-502-0015, 840-502-0019, 840-502-0026 and 840-502-0027.

Sworn at Melbourne in the State of Victoria

This 24th day of August 2009

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) *Vaughan*

Before me:



ADRIAN SERRATORE
1/550 Lonsdale Street, Melbourne VIC 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004