

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

No. 8547 of 2009

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

FOURTH AFFIDAVIT OF VANESSA ELIZABETH BLEYER

Date of document:	22 October 2009	
Filed on behalf of:	Plaintiff	
Bleyer Lawyers Pty Ltd		Ph: 9600 4224
Level 1, 550 Lonsdale Street		Fx: 9600 4225
Melbourne 3000		Code: 101385
Em: vanessa@bleyerlawyers.com.au		Ref: Vanessa Bleyer

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 ("**EEG**"). I am authorised to make this affidavit on behalf of EEG.
2. I make this affidavit from my own personal knowledge save where otherwise stated, and in my professional capacity.
3. I refer to the affidavit sworn by me on 17 September 2009 and filed herein on behalf of EEG. The last exhibit in that affidavit is marked "**VEB-23**". As a result, the first exhibit in this affidavit is marked "**VEB-24**".
4. I am instructed by Jill Redwood of EEG and believe that prior to the media release by the Minister on Friday 21 August 2009 announcing that the moratorium on logging at Brown Mountain had been lifted and VicForests

Vanessa



would be allowed to log the Brown Mountain coupes in issue in this proceeding (see exhibit "JR-45" to the affidavit of Ms Redwood sworn 28 August 2009 and filed in these proceedings), EEG had no intention of commencing proceedings of the nature it commenced on 25 August 2009.

5. These proceedings were reactive to the Minister's announcement and issued as a matter of urgency, with an immediate focus on securing an interlocutory injunction to prevent logging which VicForests had made clear was imminent.
6. Accordingly, it was not until after these proceedings were commenced and some work on the preparation of affidavits in support of the interlocutory injunction had been undertaken, that my law practice was in a position to begin searching for experts to be retained for the trial in this matter.
7. On 9 September 2009, and before this Court had given judgment in relation to the Plaintiff's application for an interlocutory injunction, employees of my law practice began the process of contacting persons who might be engaged as expert witnesses in this matter in relation to the species the subject of this proceeding, being the Long-footed Potoroo, Spot-tailed Quoll, Orbost Spiny Crayfish, Greater Glider, Yellow-bellied Glider, Powerful Owl, Sooty Owl and Large Brown Tree Frog.
8. This involved searching available literature for each species, including the Action Statements made under the Flora and Fauna Guarantee Act, assessing the various persons who might be suitable experts, conferring with a variety of people (within and outside EEG and including ecologists, conservation biologists, zoologists and academics) about suitable experts, finding correct and

Varona.



up to date contact details for individuals, conferring with Counsel about possible experts and subject matter for their reports.

9. On and from 9 September 2009 and while the matters in paragraph 8 were underway, I and members of my staff started trying to contact people who had been identified as potentially suitable experts. This process was slow and time consuming because:

- (a) it was frequently difficult to get up to date contact information;
- (b) many people were not available when we called, we had to leave messages and then continue to try to reach them by phone;
- (c) some of the people we tried to contact by email did not respond, or we got 'out of office' messages for them and we had to try repeatedly over several weeks to reach them;
- (d) some people did not respond but we needed to wait for several days or even longer to ensure there was no response before moving on to the next person we had identified in relation to that species;
- (e) some people were out doing field work and could not be contacted until they returned – sometimes this was more than several weeks;
- (f) many of the people we have been approaching work for the Department of Sustainability and Environment ("DSE") on a contract basis, and so they felt they had to check either with their superiors or colleagues within their organisation, or with other organisations, before they could tell me or my staff that they were able to talk to me or my staff, and before they would agree to consider being engaged. It often took a considerable time

Vasna,



(sometimes weeks) before I or my staff received answers back on this issue.

10. The Arthur Rylah Institute for Environmental Research is in Heidelberg and is a leading centre for applied ecological research with an emphasis on flora, fauna and biodiversity issues. On the DSE website, there is a link called "Research". On the "Research" page, there is a link called "biodiversity and conservation (Arthur Rylah Institute)" and this link takes the user to a page entitled "Arthur Rylah Institute for Environmental Research" where the following statement is made: "We are the biodiversity research base for the Department of Sustainability and Environment (DSE) in Victoria." Now produced and shown to me and marked "**VEB-24**" is a true copy of a print out of the web page.
11. A member of my staff, Yoriko Otomo, spoke to Mr Peter Menkhorst at the Arthur Rylah Institute and I am informed and believe Mr Menkhorst told Ms Otomo he thought there was a conflict of interest given the Arthur Rylah Institute is regularly retained by DSE but he would contact the DSE legal department to ask whether he or any other member of the Arthur Rylah Institute would be permitted to be engaged as an expert anyway and contact Ms Otomo thereafter.
12. At the time of swearing this my affidavit, Mr Menkhorst has not made any contact with Ms Otomo or anyone else at my office.
13. My law practice also tried to retain Mr Ed McNabb from Arthur Rylah in relation to the Sooty Owl and Powerful Owl. About 2 weeks after we first left a message for Mr McNabb about whether he would agree to be retained as an expert for EEG I received a telephone call from Mr McNabb regarding the

Urena.



Sooty Owl and Powerful Owl. Mr McNabb said to the effect that he is regularly retained by the DSE and so could not 'work on a matter against VicForests'. I said to the effect that a person engaged as an expert has an overriding duty to assist the Court impartially on matters relevant to the area of expertise, but accepted his position and thanked him for returning my call.

14. After sometimes several weeks of leaving and receiving telephone messages, sending and receiving emails, potential experts have either informed us they are not available because they will be away doing field work, or have no time, or perceived appearing as an expert witness could conflict with, or adversely affect, their contract work for DSE.
15. Since 9 September 2009, I and members of my law practice have spent considerable amounts of time and energy on the telephone and on emails trying to locate available experts for each of the eight species. This has had to be done alongside preparing and supporting the Plaintiff's injunction application, and then the further application by VicForests for security for EEG's undertaking as to damages.
16. As at the date of swearing this my affidavit, we have experts retained for:
 - (a) the Spot-tailed Quoll;
 - (b) the Powerful Owl;
 - (c) the Sooty Owl;
 - (d) the Orbost Spiny Crayfish;
 - (e) the Large Brown Tree Frog.
 - (f) the Greater Glider;

Vaughan,



- (g) the Yellow-bellied Glider; and
- (h) the Long-footed Potoroo.
17. Some of these experts have only been formally retained in the last few days. For example, the expert for the Long-footed Potoroo was only retained yesterday, 21 October 2009. We had to search interstate, in part because of experts at the Arthur Rylah Institute not being available.
18. EEG is also seeking expert evidence in relation to other issues in this proceeding, for example (but not limited to) the importance of retention of hollow-bearing trees and the effects of logging on hollow-bearing trees. As at the date of swearing this my affidavit EEG does not have experts retained in these additional areas and I expect that finalising the retention of these experts will take at least another week if not longer.
19. Briefs to each of the experts are still being prepared and have not yet been sent out. This process has taken longer than expected in part because of Counsels' availability to settle questions to the experts and also given the time taken to engage the experts. I hope to have the briefs out within the next week or so, but that will depend on Counsel settling the questions.
20. A key aspect of the pleadings in this matter is the presence or likely presence of each of the eight species in the Brown Mountain coupes, and the quality and importance of the habitat in the Brown Mountain coupes for each of the species. This means the Plaintiff requires expert evidence specially based on site visits and surveys of the Brown Mountain coupes.
21. However, I have made inquiries of each expert we have retained as to:

Uana.



- (a) the time in which they are able to undertake site visits to Brown Mountain and undertake, complete and report on any surveys they carry out there;
 - (b) the time they require to complete a report in answer to the brief we send them; and
 - (c) their availability for a December 2009 and/or March 2010 hearing.
22. The Large Brown Tree Frog expert has told me and I believe:
- (a) He requires about 7-10 days at Brown Mountain in order to properly assess the coupes as habitat and carry out surveys. His time commitments mean he would have to split this into 2 visits, one in October and one in November.
 - (b) He would need at least a month after his November visit to write up, confirm and finalise the results of his surveys and complete his expert report;
 - (c) He is not available for the first 2-3 weeks in December because he is scheduled to go to New Zealand for conferences and meetings, but he is available in March 2010.
23. The Sooty Owl and Powerful Owl expert has told me and I believe:
- (a) He requires a number of days at Brown Mountain in order to properly assess the coupes as habitat and carry out surveys. The actual number of days at Brown Mountain will only be known as the surveys progress.
 - (b) He would need about a few weeks after completion of the surveys to write up, confirm and finalise the results of his surveys and complete his expert report.

Vaona,



- (c) He will not be able to complete the report until at least early December 2009 but this will depend on how long the surveys take. He is available in March 2010.
24. The Yellow-bellied Glider and Greater Glider expert has told me and I believe:
- (a) He requires a number of days at Brown Mountain in order to properly assess the coupes as habitat and carry out surveys. His time commitments mean he expects to have to attend to the site visit during November 2009.
- (b) He would need up to a month after his November visit to write up, confirm and finalise the results of his surveys and complete his expert report however this could not be attended to until late January and early February 2010. This is because he is engaged as an expert in a trial in another state of Australia for about two weeks in December 2009 and is on leave from about late December to early January 2010. Other than the site visit he will have to prepare for the other trial during November.
- (c) He is not available for the first few weeks in December because of the trial referred to in the preceding sub-paragraph. He is scheduled to go to Japan for work commitments from 22 February 2010 to 5 March 2010. He is available from 6 March 2010 for the duration of that month. He is not available in April 2010.
25. The Spot-tailed Quoll expert has told me and I believe:
- (a) He requires a number of days at Brown Mountain in order to properly assess the coupes as habitat and carry out surveys. His time commitments mean he would have to perform the site visits during the first half of November 2009.

U. K. O. R. A.



- (b) He would need about a month after his November visit to write up, confirm and finalise the results of his surveys and complete his expert report but he is not available to attend to the report until December 2010 as he has previously-arranged work commitments during the last two weeks of November 2009.
- (c) He is available in March 2010.

26. The Orbost Spiny Crayfish expert has told me and I believe:

- (a) He can only guess how many days he will need to attend Brown Mountain in order to properly assess the coupes as habitat and carry out surveys, as it will be determined by the survey results. It is likely to be at least a few days. His time commitments mean he would have to perform the site visits during November 2009.
- (b) He would need up to a month after his November visit to write up, confirm and finalise the results of his surveys and complete his expert report which he could not do until at least during December 2009.
- (c) He is available in March 2010.

27. The Long-footed Potoroo expert has told me and I believe:

- (a) Given his current work commitments, he would not be able to attend Brown Mountain for a site visit until early December 2009;
- (b) He will need at least a few weeks to prepare his report which he expects to be able to do in late January and early February 2010.
- (c) He is available in March 2010.

Ubone



28. It is my considered opinion that the Plaintiff could not have expert reports ready for a December trial. That is because:

- (a) not all its experts are available in December and it has been extremely difficult to find experts, such that the Plaintiff is highly unlikely to be able to find any replacement experts for those who are not available for a trial in December;
- (b) most of its experts are unable to complete their site visits and surveys before the start of November 2009. Brown Mountain is a remote location and some of the experts have to come from interstate;
- (c) All of its experts are unable to incorporate the surveys and site visit results into their expert reports in time to enable the reports to be filed and served in accordance with Rule 44.03 of the Supreme Court Rules for a December trial.

29. The Plaintiff's case depends heavily on expert evidence and it is my considered opinion the Plaintiff would be significantly prejudiced in its ability to prepare and present its case in this proceeding if the matter were listed for trial in December 2009.

Sworn at Melbourne in the State of Victoria

This 22nd day of October 2009

)
) *Varaiah*

Before me:

PHILIP LINACRE

Barrister & Solicitor

Linacre Lawyers

1/550 Lonsdale Street, Melbourne 3000

An Australian Legal Practitioner

within the meaning of the
Legal Profession Act 2004

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. 8547 of 2009

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

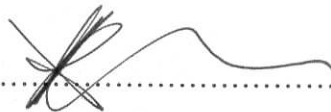
VICFORESTS

Defendant

CERTIFICATE IDENTIFYING EXHIBIT

Date of document:	22 October 2009	
Filed on behalf of:	Plaintiff	
Bleyer Lawyers Pty Ltd		Ph: 9600 4224
Level 1, 550 Lonsdale Street		Fx: 9600 4225
Melbourne 3000		Code: 101385
Em: vanessa@bleyerlawyers.com.au		Ref: Vanessa Bleyer

This is the exhibit marked **VEB-24** referred to in the affidavit of Vanessa Elizabeth Bleyer sworn before me on 22 October 2009.



PHILIP LINACRE
Barrister & Solicitor
Linacre Lawyers
1/550 Lonsdale Street, Melbourne 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

EXHIBIT VEB-24

Page from DSE website

Conservation and Environment

DSE Home > Arthur Rylah Institute

Arthur Rylah Institute for Environmental Research

Welcome to the Arthur Rylah Institute for Environmental Research (ARI) homepage. ARI is a leading centre for applied ecological research, located in Heidelberg, Melbourne.

We are the biodiversity research base for the Department of Sustainability and Environment (DSE) in Victoria.

On these pages you will find information on the Institute, project information under our 'research themes', useful reports, posters and brochures to download and contact details.

See our [Brochure](#) which summarises our activities.

 printer friendly version

This document was last reviewed on 04/10/2009

© The State of Victoria, 1996 - 2009 | Copyright and Disclaimer | Privacy

About ARI
ARI staff
Research Themes
Publications & Downloads
Seminar series
Contacts & Feedback



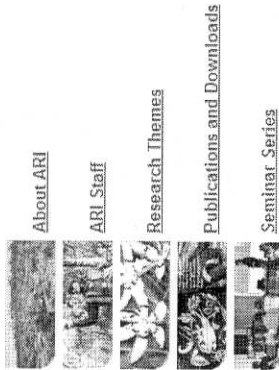
For information about DSE

Phone: 136 100

TTS: 1800 122 363

Victorian Bushfire Information Line:

1300 240 667



[About ARI](#)

[ARI Staff](#)

[Research Themes](#)

[Publications and Downloads](#)

[Seminar Series](#)

[About Us](#) | [Contact Us](#)

Department of
Sustainability and
Environment